UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,	)	
	)	
Appellant,	)	
	)	
vs.	)	**No. 17-1895**
	)	
EDWARD L. CALVERT,	)	
	)	
Appellee.	)	

Appeal from the United States District Court
For the Southern District of Indiana
Case No. 1:16-CV-00161-SEB-MJD
The Honorable Judge Sarah Evans Barker

APPENDIX TO BRIEF IN SUPPORT OF NATIONAL LABOR RELATIONS BOARD'S APPEAL

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Appellant, the National Labor Relations Board ("the Board"), pursuant to Circuit Rule 30, here files this APPENDIX TO BRIEF IN SUPPORT OF NATIONAL LABOR RELATIONS BOARD'S APPEAL. The undersigned certifies that all of the materials required by Circuit Rule 30(a) and (b) are included in this appendix. The contents of the appendix are as follows:

CONTENTS OF APPENDIX

Appendix Exhibit	**Document Description**	**Docket Location**
1	Complaint, filed by Plaintiff National Labor Relations Board against Defendant Edward Lee Calvert; filed on 01/02/15.	Bankr. Dckt.[1] 1
2	Answer to Complaint, filed by Defendant Edward Lee Calvert; filed on 02/03/15.	Bankr. Dckt. 17
3	Statement of Material facts not in Dispute and Memorandum of Points and Authorities in Support of the National Labor Relations Board's Motion for Summary Adjudication of Nondischargeability; filed on 06/05/15.	Bankr. Dckt. 33-1
4	Order Denying Motion for Summary Judgment; issued on 09/01/15.	Bankr. Dckt. 39
5	Minute Entry/Order [Trial held. Court heard and considered testimony of Lisabeth Luther and Edward Calvert. Plaintiff's exhibits 1-13 admitted without objection; filed on 09/23/2015.]	Bankr. Dckt. 51
6	Transcript filed by J & J Court Transcribers, Inc. regarding trial/hearing held 9/23/2015; filed on 11/04/2015.	Bankr. Dckt. 54
7	Decision and Order of the National Labor Relations Board issued on July 29, 2005 and reported at E.L.C. Elec., Inc., 344 NLRB 1200 (2005). [Plaintiff's exhibit 2 admitted at	Bankr. Dckt. 54, p. 10.

[1] Citations to "Bankr. Dckt." are to Adversary Proceeding No. 15-50001, which is related to Bankruptcy Proceeding 13-13079.

	bankruptcy trial on 09/23/15; see exhibit list Dist. Ct. Dckt. 3 at 168.]	
8	Decision and Order of the National Labor Relations Board issued on November 8, 2008 and reported at E.L.C. Elec., Inc., & Its Alter Ego &/or Successor Midwest Elec. & Retail Contractors, Inc., d/b/a MERC, Inc., & Asset Mgmt. Partners, Inc., A Single Integrated Enter. & Single Employer, & Edward L. Calvert, Individually, 359 NLRB No. 20 (Nov. 8, 2012). [Plaintiff's exhibit 4 admitted at bankruptcy trial on 09/23/15; see exhibit list Dist. Ct. Dckt. 3 at 168.]	Bankr. Dckt. 54
9	Seventh Circuit judgment enforcing the NLRB's order issued on June 20, 2013, as amended on July 23, 2013. National Labor Relations Board v. E.L.C. Electric, Inc., et al. 7th Cir. No. 13-1952. [Plaintiff's exhibit 5 admitted at bankruptcy trial on 09/23/15; see exhibit list Dist. Ct. Dckt. 3 at 168.]	Bankr. Dckt. 54
10	Bankruptcy Court's Findings of Fact and Conclusions of Law; filed on 12/21/2015.	Bankr. Dckt. 56
11	Bankruptcy Court's Judgment Order; filed on 12/21/2015.	Bankr. Dckt. 57
12	Notice of Appeal from Bankruptcy Court's decision filed by Plaintiff National Labor Relations Board filed on 01/19/2016.	Bankr. Dckt. 62
13	District Court's Order on Bankruptcy Appeal; filed on 3/31/2017.	Dist. Ct. Dckt. 14
14	District Court's Judgment; filed on 3/31/2017.	Dist. Ct. Dckt. 15
15	Notice of Appeal from District Court's decision filed by Plaintiff National Labor Relations Board filed on 04/28/2017.	Dist. Ct. Dckt. 16
16	29 U.S. Code § 157 - Right of employees as to organization, collective bargaining, etc.	

17	29 U.S. Code § 158(a) Unfair labor practices by employer.	

Respectfully submitted,

NATIONAL LABOR RELATIONS BOARD

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Dated at Washington, DC
this 10th day of July, 2017

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,	)	
Appellant,	)	
vs.	)	**No. 17-1895**
EDWARD L. CALVERT,	)	
Appellee.	)	

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the *APPENDIX TO BRIEF IN SUPPORT OF PLAINTIFF NATIONAL LABOR RELATIONS BOARD'S APPEAL* was filed electronically with the Court's CM/ECF system this 10th day of July, 2017, which will send an electronic notice to all registered parties and counsel. All parties are represented by counsel and may access the filing through the Court's CM/ECF system.

/s/ William R. Warwick

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

In re:	:	
	:	Bankruptcy Case No. 13-13079
EDWARD LEE CALVERT,	:	Chapter 7
Debtor.	:	
	:	
NATIONAL LABOR RELATIONS BOARD,	:	
Plaintiff,	:	Adv. Pro. No.
	:	
vs.	:	
	:	
EDWARD LEE CALVERT,	:	
Defendant.	:	

COMPLAINT OF THE NATIONAL LABOR RELATIONS BOARD FOR A DETERMINATION OF NONDISCHARGEABILITY OF THE BOARD'S CLAIM, AND/OR FOR DENIAL OF DISCHARGE IN BANKRUPTCY

The National Labor Relations Board ("NLRB"), a creditor in the above-captioned bankruptcy case, through its undersigned counsel, hereby seeks a determination, pursuant to Section 523(a)(6) of the Bankruptcy Code (11 U.S.C. §523(a)(6)), that certain debts owed to the Board by the Debtor are nondischargeable in bankruptcy. That is to say, the NLRB's claim against the Debtor, Edward L. Calvert ("Calvert"), is for damages owed to Calvert's former employees to remedy the unlawful injuries he intentionally caused them.

More broadly, the NLRB seeks a determination, pursuant to Sections 727(a)(3) and (a)(4) of the Bankruptcy Code (11 U.S.C. Sections §§727(a)(3) and (a)(4)), that Calvert should be denied a discharge in bankruptcy. As shown below, throughout this proceeding Calvert has failed to adequately document his financial condition and has concealed assets and business activity - omitting them from his bankruptcy schedules and then, only after confrontation by the NLRB or the Case Trustee, venturing shifting and evasive explanations. Calvert's conduct demonstrates a

cavalier disdain for his obligations to his creditors and indeed to this proceeding that should preclude him from obtaining a discharge of his debts under the Bankruptcy Code.

In support of its Complaint, upon information and belief, the NLRB alleges as follows:

1. This Court has jurisdiction of this matter pursuant to 28 U.S.C. Section 157(b) and 28 U.S.C. Section 1334.

2. Calvert filed a Chapter 7 bankruptcy petition on December 19, 2013, currently pending in this Court.

3. Calvert seeks a discharge of his debts under Section 727 of the Bankruptcy Code, 11 U.S.C. §727.

4. The NLRB is a creditor of Calvert within the meaning of Section 101(9) of the Bankruptcy Code, 11 U.S.C. §101(9), based upon a July 23, 2013 Judgment of the Court of Appeals for the Seventh Circuit enforcing a supplemental Decision and Order of the Board. *NLRB v. E.L.C. Electric, Inc., its alter ego and successor Midwest Electrical & Retail Contractors, Inc., d/b/a MERC, Inc., its alter ego Asset Management Partners, Inc. and Edward Calvert, an individual*, No. 13-1952, *enfg.* E.L.C. Electric, Inc., 359 NLRB No. 20 (2012).

5. Pursuant to the Seventh Circuit Judgment, Calvert is personally liable to the NLRB for the payment of substantial amounts of backpay owed as a result of numerous unfair labor practices committed by him and his now-defunct business, E.L.C. Electric, Inc. ("ELC"), in violation of the National Labor Relations Act, as amended, (29 U.S.C. §§151, et. seq.) ("the Act").

6. Calvert's unpaid indebtedness to the NLRB pursuant to the Seventh Circuit Judgment currently runs to $435,382. This amount includes interest through November 30, 2013 (i.e. the month prior to his filing), minus amounts collected by the NLRB pursuant to a prejudgment writ of garnishment action filed in the U.S. District Court Southern District of Indiana in Case 1:13-mc-00130-RLY-MJD.

I. Section 523(a)(6)

7. Section 523(a)(6) of the Code provides that an individual debtor's discharge shall not include any debt "for willful and malicious injury by the debtor to another entity . . .." 11 U.S.C. § 523(a)(6).

8. As noted above, Calvert's liability pursuant to the Seventh Circuit Judgment derives from his unlawful labor practices taken against his former employees. The Seventh Circuit enforced the NLRB's findings that Calvert had, in retaliation against his employees for engaging in activity protected by the Act, effectively sabotaged his business and funneled significant portions of its assets into other enterprises and/or his family members' personal funds. Thus:

(a) In a decision dated July 29, 2005, reported at 344 NLRB 1200 (2005), the NLRB found that Calvert, through his defunct business ELC, unlawfully terminated 16 employees in 2003 in retaliation for their lawful and statutorily protected union activities.

(b) In a supplemental decision dated November 8, 2012, reported at 359 NLRB No. 20 (2012), the Board found that Calvert intentionally closed ELC and transferred all of ELC's assets to himself, his other businesses and his family members.

(c) Finding that Calvert took these actions in order to perpetrate a fraud on his employees, the enforced NLRB order pierced the corporate veil and held Calvert personally liable, finding that Calvert had cobbled together a complex scheme, the purpose of which was to shirk his backpay obligation. *Id.* at 9. Thus: "Calvert has sought to evade his legal obligations to pay the backpay owed to the 16 discriminatees. He effectively sabotaged ELC's business, funneled an apparently significant portion of its assets into other enterprises and/or his family members' personal funds," and created and operated an alter ego "as a means of evading ELC's obligations under the [National Labor Relations] Act." *Ibid.*

9. Calvert engaged in the above actions intentionally, without lawful cause or excuse, knowing and that such conduct would or was substantially certain to cause injury to the employees to whom substantial amounts of backpay are owed, and whose interests the NLRB here represents.

10. The facts set forth in paragraphs 7 through 9, above, establish that the judgment debt owed by Calvert to the NLRB is a debt "for willful and malicious injury by the [D]ebtor to another" within the meaning of Section 523(a)(6) of the Bankruptcy Code, and is therefore nondischargeable.

II. Section 727(a)(3)

11. Section 727(a)(3) of the Bankruptcy Code provides that the court shall not grant the debtor a discharge if "the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained . . .." 11 U.S.C. §727(a)(3).

12. (a) On December 19, 2013 Calvert filed Schedules A-J and his Statement of Financial Affairs in Case 13-13079. (Case 13-13079, Docket No. 1.)

(b) Calvert's Schedule B, Item 16 (Accounts receivable), lists "loans to Kevin Calvert, son" valued at $274,000.

(c)The above amount represents 91% of Calvert's declared personal property.

(d) On November 19, 2012, during a deposition conducted by counsel for the NLRB in relation to a protective restraining order and prejudgment writ of garnishment entered by the United States District Court for the Southern District of Indiana in Case 1:13-mc-00130-RLY-MJD, Calvert testified, under oath that between October 2006 and September 2010 he loaned close to $545,000 to his son Kevin Calvert and his daughter Katrina Stringer a/k/a Katrina Calvert;

(e) During an April 24, 2014 examination pursuant to Rule 2004, Calvert testified, under oath, that all loans made to his son Kevin are formalized in promissory notes;

(f) During that examination Calvert testified that most of those promissory notes were signed by him and by his son Kevin on the date of each transaction;

(g) Despite repeated requests by the US Trustee, the Case Trustee, and the NLRB for the signed promissory notes, Calvert has failed to produce them;

(h) On September 6, 2012, during a deposition conducted by counsel for the NLRB in Case 1:13-mc-00130-RLY-MJD, Kevin Calvert testified, under oath, that he was unaware of any documentation memorializing the terms of the loans to him from his father;

(i) During an August 14, 2014 examination pursuant to Rule 2004, Calvert testified, under oath, that the total amount of checks he had written to his son Kevin between January 1, 2009 and August 12, 2012 was $340,000, and that this represented the amount of the loans he had made to Kevin;

(j) During that examination, Calvert later testified that the amount given to Kevin was $376,000, but later still that it was $318,650;

(k) Also during that examination, the NLRB questioned Calvert about a document that was prepared and produced to the NLRB by Calvert and purported to set forth the origin and amount of each loan to Kevin; Calvert, however, was unable to answer the NLRB's questions concerning the document and conceded that he did not know what information the document actually contains.

13. By the conduct set forth in paragraph 12, Calvert has concealed, falsified, or failed to preserve records from which a critical aspect of his financial condition can be ascertained, within the meaning of Section 727(a)(3) of the Bankruptcy Code.

Section 727(a)(4)

14. Section 727(a)(4)(A) of the Bankruptcy Code provides that the court shall not grant the debtor a discharge if "the debtor knowingly and fraudulently, in or in connection with the case – (A) made a false oath or account." 11 U.S.C. § 727(a)(4)(A).

15. Calvert's Statement of Financial Affairs, Item 1 states that his only income from employment or operation of a business was rental payments in 2011, 2012, and 2013. (Case 13-13079, Docket No. 1.)

16. During the January 28, 2014 First Meeting of Creditors, Calvert testified:

(a) that his only current source of income was Social Security;

(b) that he received no monthly income from his son Kevin;

(c) under the persistent questioning of the Case Trustee, Calvert admitted that his wife, Linda Calvert, received money from Kevin on an "as needed" basis; but that

(d) he had no other sources of income.

17. During the August 14, 2014 Rule 2004 examination, Calvert testified that he did not have a consulting business during 2013 and that, in fact, "I did not have any business, nor have I ever had any business."

18. Contrary to the sworn representations set forth in ¶¶ 16 and 17, Calvert performed services during 2013 under the business name Express Consulting, located at 3960 Southeastern Avenue, Indianapolis, IN. 19. Calvert's Statement of Financial Affairs, Item 18 – "Nature, location and name of business" fails to list Express Consulting. (Case 13-13079, Docket No. 1.)

20. During the First Meeting of Creditors, Calvert stated that he had made no transfers to any other person, including his wife and children, in the year prior to filing.

21. Contrary to the above testimony, Calvert deposited the compensation he received for the work performed as Express Consulting into his wife Linda's bank account.

22. In Calvert's Schedule B – Personal Property, Calvert claims in category #1 (Cash on hand), $10 located "on person." (Case 13-13079, Docket No. 1.)

23. Contrary to the sworn representation referenced in ¶22, on December 9, 2013, just days before Calvert filed his petition, he received a check in the amount of $10,000 from Interior Specialties, Inc.

24. In Calvert's Schedule B – Personal Property, in which he is instructed to include property "held for the debtor by someone else," Calvert claims to have no assets in category #2 (Checking, savings or other financial accounts). (Case 13-13079, Docket No. 1.)

25. Contrary to the sworn representation referenced in ¶24, Calvert effectively controls a bank account that is in his wife, Linda Calvert's, name, or, alternatively, Linda Calvert holds that account for Calvert's benefit. Calvert made deposits into that account, as did his son Kevin, and Calvert drew from it as needed. More specifically:

(a) Calvert uses his wife's account to pay his bills;

(b) Calvert deposited into his wife's account his earnings from the work performed as Express Consulting.

26. Despite Calvert's control of and benefit from Linda Calvert's account, Calvert omitted it from his Bankruptcy Schedules.

27. By the conduct set forth in paragraphs 15 through 26, above, Calvert has knowingly and fraudulently made false oaths and accounts in connection with this case, within the meaning of Section 727(a)(4) of the Bankruptcy Code.

WHEREFORE, the Board respectfully requests that the Court, pursuant to 11 U.S.C. 523(a)(6), enter an order declaring the Board's claim against Calvert to be nondischargeable, and that the Court enter an order, pursuant to 11 U.S.C. §§727(a)(3) and (a)(4),

denying Calvert a discharge, and that the Court grant such other relief as the Court shall deem just and proper in the circumstances.

Respectfully submitted,

NATIONAL LABOR RELATIONS BOARD

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National Labor Relations Board
Region Twenty-Five
Minton-Capehart Federal Building, Room 238
575 North Pennsylvania Street
Indianapolis, Indiana 46204

Dated at Washington, DC
this 2nd day of January, 2015

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

IN RE:	:	
	:	**Bankruptcy**
EDWARD LEE CALVERT	:	**Case No. 13-13079-JMC-7**
Debtor	:	**Chapter 7**
	:	
NATIONAL LABOR REATIONS BOARD	:	
Plaintiff	:	**Adv. Pro. No. 15-50001**
	:	
Vs.	:	
	:	
EDWARD LEE CALVERT	:	
Defendant	:	

ANSWER TO COMPLAINT OF THE NATIONAL LABOR RELATIONS BOARD FOR A DETERMINATION OF NONDISCHARGABILTY OF THE BOARD'S CLAIM, AND/OR FOR DENIAL OF DISCHARGE IN BANKRUPTCY

Edward Lee Calvert, Pro Se ("Calvert"), a Defendant and Debtor in the above-captioned bankruptcy case, respectfully submits this Answer to the National Labor Relations Board ("NLRB") Complaint regarding non-dischargeable Debts alleged owed to former employees.

Calvert vehemently denies the alleged claim charged by the NLRB that Calvert Intentionally caused financial injuries to employees, that Calvert failed to adequately document his financial condition and concealed assets and business activity and that Calvert was evasive explaining asked questions.

In support of our answer to the NLRB's alleged complaint, we answer as follows;

1. This court has jurisdiction of this matter pursuant to 28 U.S.C. Section 157 (b) and 28 U.S.C. Section 1334.

2. Calvert filed a Chapter 7 bankruptcy petition on December 19, 2013, currently pending in this court.

3. Calvert seeks a discharge of his debts under Section 727 of the Bankruptcy Code 11 U.S.C. ~727.

4/5. Calvert denies that the NLRB is a creditor in Calvert's bankruptcy case as claimed on page 2, item 4, of the Adversary Proceeding Complaint document (APC).

a. Calvert has testified since 2003, that making labor changes at ELC Electric, Inc from in house labor to using outside labor providers was suggested to Calvert by his labor attorney who insisted the action was legal and that he had other clients who had made the same changes. This attorney personally led Calvert through the labor changes and employee notification process. Had Calvert known these changes were not according to NLRB rules, the NLRB rules prohibited ELC Electric from making these labor changes, even though notification came after Calvert made the changes, Calvert would have immediately reversed this action. Instead, and **the cause of the mammoth amount of back pay owed,** the NLRB let Calvert operate for two years before filing charges of wrongdoing and NLRB rules violation.

b. **Every** employed laid off was sent by certified mail a letter stating the reason for the labor changes, the name, address, and phone number for the Labor Provider selected to provide the companies labor, and a **guarantee** of continued employment on the ELC Electric project where they were presently working. This letter also informed all employees they would not lose any time necessary to make these changes signing up with the labor provider and would make the same, or better wages, and the same, or better fringe benefits.

c. Clearly there was no intention of Calvert to cause any unlawful action against employees and/or intentionally cause harm.

d. The NLRB bypassed normal judicial practices of filing for collection action in

A Federal Court and instead went to a Federal Circuit Court of Appeals to file for a Collection order. This action was purposely done to circumvent and get ahead of the Upcoming Supreme Court Decision on the NLRB v. Noel Canning case, which they were aware of, where it was anticipated by many legal scholars, that decisions and orders handed down by the NLRB in Washington D.C. in 2012, would be overturned due to the NLRB Panel being unconstitutionally seated by President Obama's recessed appointments.

e. On June 26, 2014, the Supreme Court issued a 9-0 decision in NLRB v. Noel Canning stating decisions made by the Washington D.C National Labor Relations Board was **unconstitutional** because the board lacked the proper Quorum. Based on this ruling, at the least, the NLRB charges against Calvert should return to the D.C. Board to be properly adjudicated before a constitutional seated board. Calvert will have the opportunity to go before the Board, bring witnesses, documents, and give oral testimony why piercing the corporation should not be allowed. If the board renews their past position, Calvert will have the opportunity to appeal their decision to a Federal Court.

f. Thousands of remaining 2012 NLRB decisions presently under review by Courts to determine the Supreme Court's impact upon those cases strongly suggests the 7th US Court of Appeals will at some later date reverse itself opening the door for the NLRB's decision to be argued in court.

6. Calvert disputes the amount of $435,382 as the amount of Calvert's unpaid indebtedness to the NLRB that they claim on page 2, item 6 of the APC document.

a. The NLRB confiscated approximately $30, 000.00 from Midwest Electric and Retail Contractors (MERC).

b. The NLRB sold equipment and supply's belonging to MERC and confiscated

money (amount is not known).

c. According to NLRB documents, the debt alleged owed to the NLRB includes all monies and assets of MERC and Kevin Passman, sole owner of MERC. The money confiscated from MERC and/or Kevin Passman has not been deducted from the alleged amount the NLRB claims is owed.

I. Section 523 (a)(6)

7. The NLRB claims Section 523(a)(6) of the code provides an individual debtor's discharge shall not include any debt "for willful and malicious injury by the debtor to another entity". Clearly sub items (a) (b) and (c) in item 4 on page 2 (listed above) of our response to the APC document, show there was no willful or malicious injury to any entity and is evidenced by certified mail guaranteeing all employees continued work with ELC Electric.

8. Calvert vigorously denied and disputed allegations of unfair labor practices alleged at NLRB Hearings in 2003 and 2005. **Calvert appealed every decision** and order issued by Administrative law judge (ALJ) Ira Sandron. Because of Calvert's appeals, the matter was transferred to the NLRB in Washington D.C, to be continued. Previous documents submitted show, prior to closing Calvert's business, **he and his wife loaned** ELC Electric 1.1 million Dollars to pay company debts. The NLRB allegations Calvert sabotaged his 30-year-old business that had adequately supported his family for years and the fact he and his wife only recently loaned the company an enormous amount of money, with no recourse of the money being paid back is absurd and non-sensible. The other allegation Calvert funneled its assets and funds to other enterprises and/or family members are also false and without any merit.

a. Calvert did not have legal representation due to inadequate finances when the NLRB cases were sent to Washington D.C. to be continued.

a. Calvert was not aware of time restrictions necessary to appeal the Washington D.C. Board's ruling or to whom the appeal would be addressed.

c. Calvert was denied the opportunity to appear before the Washington D. C. Labor Board to orally testify and rebut their findings, decision, and order of ALJ Ira Sandron which transcripts of the 2005 hearing show were bias. Transcripts also show ALJ Sandron refused Calvert's attorney's request to "read back the record" and ALJ Sandron's advising the NLRB attorney as how to form a question to Calvert, after Calvert's attorney objected to a previous question. The judge spoke to the NLRB attorney from the bench and on the record saying, "and then WE will------ and he stopped short of completing his thought. Immediately the NLRB attorney asked Calvert the question in the exact form as the judge recommended and the judge over ruled Calvert's attorney objection. Because of these facts in evidence and appearing on the record, Calvert believes a newly constitutional seated National Labor Relations Board would overturn ALJ Sandron's Decision and Order, but if not, appealing the ruling to a federal district Court would have been successful.

d. Allegations listed on page 3, item 8, sub item (a), in the APC documents are completely false. This decision was appealed. It should be noted, no hard evidence exists, or was any ever introduced into evidence. The allegations are nothing more than fabrications and speculations by the NLRB in their efforts to make their case against Calvert (See item 4, sub items (a) & (b) on page 2 listed above).

e. Allegations listed on page 3, item 8, sub item (b) in the APC document is completely false. The decision was appealed. It should be noted, no hard evidence exists or was any ever introduced into evidence. The NLRB allegations are nothing more than fabrications and speculations by the NLRB in their efforts to make their case against Calvert (See item 7 on page 4 above).

f. Allegations listed on page 3, item 8, sub item (c) in the APC documents are completely false. The decision and order from ALJ Ira Sandron was appealed. It should

be noted, no hard evidence exists or was ever introduced into evidence. The allegations are nothing more than fabrications and speculations by the NLRB in their efforts to make their case against Calvert.

g. The allegations made by ALJ Ira Sandron to allow piercing the corporate veil was based on nothing less than bias and deceitful opinion. No hard evidence was submitted warranting his decision, only circumstantial assumptions was used. Sandron ruled an alter ego existed claiming Calvert was part of MERC, however, no agreement existed showing Calvert to be a part of Kevin Passman's company, no checks were ever written to Calvert from this company, Calvert never played any part in the company nor did Calvert have any firsthand knowledge of MERC's work or employees. Sandron's decision in this matter was pure fabrication. A UN bias review of his decision will provide the proof needed to substantiate the corporate veil should not have been pierced and any legitimate financial debt of ELC Electric would be a corporate matter.

9/10 The allegations made by the NLRB on page 4, items 9 and 10, in the APC Documents are false and nothing more than further rhetoric attempting to justify their position to deny discharge of debt in Calvert's bankruptcy. Reviewing page 2, item 4, sub Items (a) (b) and (c) listed above, show previous documents submitted including appeals, clearly indicate Calvert did not have intentions nor did not have any willful or malice toward employees or to cause injury to same. **The position of the NLRB citing Section 523(a)(6) is not applicable to Calvert's Bankruptcy case. The debt should be Dischargeable.**

II. Section 727(a)(3)

11. Calvert denies the NLRB allegations as stated on page 4, item 11, of their Adversary Proceedings Complaint (APC) document that he knowingly and fraudulently made a false oath in his Bankruptcy petition documents and that he unlawfully participated in document

manipulation as listed in their complaint.

12. Calvert denies the representation made by the NLRB pertaining to discrepancies and insinuating Calvert's testimony changed. We will answer the allegations separately according to the sub items listed (a) through (k) on pages 4 and 5 of the APC documents;

(a) Calvert's bankruptcy petition was filed by Bill Tucker on December 19, 2013.

(b) $274,000.00 was listed on Scheduled B item 16, as being owed to Calvert. The amount listed in Calvert's bankruptcy petition represented one-half of the total money loaned to Kevin Calvert. Since Kevin's mother did not file for bankruptcy and since she was never part of any action by the NLRB, her half of the money loaned to Kevin Calvert was not listed in Calvert's bankruptcy petition.

(c) Not sure whether this statement is true or not.

(d) At the 2012 deposition Calvert was asked to remember the amount of money loaned to his son and daughter between 2006 and 2010, six years past. The $545,000.00 (total of money Calvert and his wife loaned to son) Calvert testified as the amount loaned to his son at the November 19, 2012 deposition is consistent with Calvert's listing in his bankruptcy petition (one-half of the total money loaned to Kevin Calvert – $274,000.00).

(e) To the best of my memory and knowledge, all loans to my son were formalized with promissory notes. True

(f) I cannot remember the exact testimony however, most of the promissory notes were signed on the day of the loan or thereabout. True

(g) The NLRB is fully aware Calvert testified that he could not locate the "signed" promissory notes (notes that were 6-4 years old), however Calvert reproduced from his personal computer, a copy of each promissory note which showed the promissory note date, the person's name to which the loan was made to, and the amount of the loan. Calvert further explained to the NLRB a disc could be made from the

computer hard drive, which would verify the promissory notes were indeed entered into the computer at the dates listed removing any speculation that the notes could have been reproduced at one time.

(h) The statement made by the NLRB claiming Kevin Calvert testified at a September 6, 2012 deposition that he was unaware of any documentation memorializing the "terms" of the loans to him from his father is **completely false or misleading**. Kevin and I have always testified money from me and his mother were "loans" to him and that promissory notes were made to keep a record of the loans and the total amount of the loans. Kevin may have testified he could not remember or was unaware of the "terms" (amount of interest, date of repayment, etc) but he never testified that promissory notes were never made.

(i) (j) Without reading the transcript of the August 14, 2014 Rule 2004 examination, I cannot dispute 100% the allegations made by the NLRB claiming I gave three different answers to the amounts I loaned to my son, however, I can say with certainty, the events the NLRB sets forth are at best misleading. It does not make any sense that this would happen at the same day and at the same examination.

Documenting the money loaned to Kevin Calvert is a complex issue. Complex because the money loaned to Kevin came from two different, government approved IRA Retirement accounts, one from my account and one from my wife's account. To be as accurately as possible, Calvert requested information from the Edward Jones Financial company, holder and distributor for both IRA accounts. Edward Jones first gave Calvert a listing of money taken from each account and the year the money was taken. The total amount listed for Calvert's account was first thought to be the total amount Calvert (excluding Calvert's wife money) loaned to Kevin.

After further consideration, I remembered not all money withdrew from both IRA

accounts went as loans to Kevin Calvert but some of the money went to pay bills. For this reason I requested Edward Jones photocopy each distribution from each account and send to me for review. Specific money from specific accounts loaned to Kevin Calvert was extremely difficult to trace accurately for these reasons;

Whenever Linda and I needed money from our IRA accounts, we would call Edward Jones and ask them to deposit into our joint checking account a certain amount of money. Edward Jones would then look at all accounts, the ready cash funds in each account, and the stocks and bonds, which would be the easiest to convert to cash in each account. Edward Jones would then assemble the money requested and directly deposit into our joint checking account. We would then write a check for the amount our son needed out of our joint checking and loan it to him. To make matter more complex, many times the money we requested from Edward Jones was needed to loan Kevin only some of that money, the remaining portion going to pay bills. (An example would be if we requested $15,000.00 be taken from our IRA accounts and $10,000.00 of that money be loaned to Kevin and the other $5000.00 be used to pay bills).

Finally I constructed a spread sheet attempting to breakout each transaction and track money loaned to Kevin from Edward Calvert and money loaned from Linda Calvert that came from our IRA accounts and to track the money that came from our joint home equity loan accounts (two Accounts). Each time the amounts loaned to Kevin changed I immediately informed Michelle at Tucker and Associates for them to make changes to my bankruptcy petition as necessary (see documents enclosed for review).

(k) The NLRB's allegation is confusing. The document should speak for itself. The money taken from my IRA account, my wife's account, and our two home equity accounts and loaned to our son, has been explained in the Rule 2004 examinations IN DETAIL. The NLRB knowing the complexity of the issue has tried to portray Calvert as

someone who makes up numbers and thus is untrustworthy. I hope that the enclosed documents and my explanation show my research and computations show my only intent was to submit an honest accounting confirmed by the record.

13. Calvert denies all the NLRB allegations listed on page 5, item 13, in the APC document. Calvert did not conceal, falsify, or fail to preserve records of his personal or company's financial conditions. The vast number of records subpoenaed by the NLRB and other records submitted independently of the subpoenaed documents prove this claim is bogus.

III. Section 727(a)(4)

14. Calvert denies the NLRB allegations listed on page 6, item 14, in the APC document claiming Calvert made a false oath. All of the information listed above dispels this allegation.

15. After review of the NLRB claim on page 6, item 15, regarding omitted income from the Statement of Financial Affairs in Calvert's bankruptcy petition, it appears their allegation is true. It was clearly a mistake. Listing the money Calvert earned in 2013 would not change the financial condition of Calvert at the time of his filing nor would listing the income add to Calvert's estate, since the money was deposited in the bank to pay bills.

16. Calvert answers the NLRB statements listed on page 6, item 16, of the APC document pertaining to testimony given on January 28, 2014 in the first meeting of creditors as follows;

a. On January 28, 2014, Calvert's only current regular source of income was social security.

b. On January 28, 2014, Calvert did not and was not receiving monthly income from his son Kevin.

c. The trustee asked Calvert if he was receiving a "monthly siphon" from his son Kevin. Calvert's answer was no. At a follow up question regarding the family's income, Calvert testified Kevin Calvert **repaid** various amounts of money at various

times (no set time and no set amounts) to his mother, money his mother had previously loaned to him. This money was used to pay bills.

(d) Item (d) is a repeat of statement in item (a) above. On January 28, 2014, Calvert did not have any other regular income than social security.

17/18/19. Calvert denies the NLRB allegations listed on page 6, items 17, 18, and 19 in the APC document that he had a Consulting company. Calvert testified he did not have a consulting business in 2013, which is true. A business is defined as **'"a person's regular occupation, profession, or trade"** or **"the practice of making one's living by engaging in commerce"**.

Calvert was contacted in 2013 by a long time personal friend. The friend knew of Calvert's expertise in construction and ask Calvert for help. The friend needed someone to look at a renovation project and let him know the approximate cost to do the needed work. The friend told Calvert he would pay him to compensate for his time, gas, and other direct expenses. The friend later ask Calvert to oversee the renovation project making sure the construction was done correctly and for this Calvert received approximately $10,000.00 for several months of work. Calvert randomly picked the name "Express Consulting" for billing purposes only, which in hind sight was a bad choice. Calvert also listed the address to be 3960 Southeastern which was another bad choice. Calvert listed this address because he was spending a lot of time at that address overlooking construction work being done at that location. Coincidental, another close friend asked Calvert to oversee the renovation work being done at Calvert's son business For this work Calvert was paid $10,000.00.

I did not then or do not now, classify that I had a "consulting business". A business is an entity that has an office, a telephone, and someone who solicit work from a company or from another person. The business needs a retail marketing certificate with a business number. I did not solicit any work from anyone. I never filed for any business license or business number. I

was given a 1099 made out to Edward Calvert and completed a W9 using my social security number. In 2014, my taxes were filed and the income was reported.

20/21. Calvert denies the NLRB allegations listed on page 6, items 20 and 21 claiming Calvert fraudulently transferred money to his wife Linda.

a. In July 2012, the NLRB appeared before Judge Dinsmore *ex parte* in Federal court and requested a Protective Restraining Order against Calvert. The order was issued July 23, 2012. Immediately the NLRB confiscated all money in Edward Calvert and Linda Calvert's **Joint** bank accounts at Fifth Third Bank and issued a garnishment against Edward Calvert. Half of the money belonged to Calvert's wife Linda however the NLRB was unconcerned ever though they took money belonging to Linda Calvert which was never a part of any NLRB claims or legal matters. This money plus interest should be repaid to Linda Calvert immediately.

b. Because of the NLRB action, the Fifth Third bank account was closed and Linda Calvert open a personal bank account in her name (with my daughter as signatory) to allow our family to have a place to direct deposit social security checks and pay household and any other bills owed. There was no other option. If Linda or Calvert deposited even social security checks in the Fifth Third bank account, base on our past experience with the NLRB, the NLRB would confiscate any money deposited leaving us without money to buy food, medicines, gas, or to pay other essential bills. It's absurd to claim Calvert illegally transferred money to his wife because he deposited money into her account to pay **their** bills. Calvert has no other place to deposit social security checks and/or any other checks received in his name.

22/23. Calvert denies the NLRB allegations made on page 7, items 22 and 23, in the APC documents insinuating Calvert had more money than claimed in Schedule B-Personal Property-Category #1 ($10.00 on person) in Calvert bankruptcy petition. As usual, the NLRB has no proof for their claim but expects the court to believe their accusation without proof. The $10,000.00 check from Interior Specialties (received 10 days before the filing of Calvert's bankruptcy) was

deposited in Calvert's wife's Chase bank account (the only bank account available to deposit a check) and was used to pay OUR bills (just like the way my social security check is deposited in Linda's Chase bank account to help pay OUR bills).

24/25/26. Calvert vehemently denies the NLRB allegations made on page 7, items 24, 25, and 26, in the APC documents where they claim Calvert controls Linda Calvert's Chase bank account and in doing so Calvert should have listed it in his bankruptcy petition.

a. Calvert does not control Linda's bank account. The bank account is used to deposit mainly social security checks for both Edward and Linda, and is used to pay bills most of which are jointly owed. The two home equity bank accounts are in both names, the home gas account, home electric account, trash account, home insurance accounts, and vehicle insurance account are all debts owed jointly. Add medicines (at times almost a thousand dollars in some months), groceries, gas for cars sundry expenses, and other items needed both for Linda and Calvert. It's foolish and unrealistic to believe more than one bank account would be used to make these transactions.

b. Calvert does help in paying **their** bills. As explained above in item (a) these bills are jointly owed. Helping my wife pay our bills does not mean I am solely controlling this account as the NLRB insinuates. There was no need to list it on my personal bankruptcy schedule because it is not a sole asset of mine. Thinking otherwise would be an exercise in unrealistic assumptions.

27. Calvert denies the NLRB allegations listed on page 7, item 27, in the APC document where they claim Calvert knowingly and fraudulently made false oaths and accounts in connection with this case within the meaning of Section 727(a)(4) of the bankruptcy code. Calvert made ever attempt to answer all questions in his bankruptcy petition honestly and truthfully. Documents submitted and answer to allegations listed in this document confirms no deceit or false reporting from Calvert existed when completing his bankruptcy petition.

The NLRB's entire argument for requesting that a part of Calvert's bankruptcy petition be non dischargeable is based on the Seventh Circuit Court of Appeals granting their motion to uphold and order collection of money the NLRB claimed owed in their 2012 decision against Calvert. The Seventh Circuit Court of Appeals on July 23, 2013.granted the Order based on the belief the information the NLRB gave to them was legitimate and not knowing the U.S. Supreme court was ready to issue a decision in the NLRB v. Noel Canning case that could overturn every decision made by the NLRB in 2012 (Calvert case included). On June 26, 2014, the U.S. Supreme Court ruled 9-0 the NLRB actions taken in 2012 were unconstitutional and all cases ruled on during that period should be null and void. Without this order from the Seventh Circuit Court of Appeals, the NLRB does not have any claim against Calvert's bankruptcy.

WHEREFORE, Edward Lee Calvert respectfully request that the Court, based on the information herein provided, enter an order of discharge in Calvert's **Bankruptcy case no. 13-13079-JMC-7A.**

Respectfully Submitted

EDWARD LEE CALVERT

Dated in Indianapolis, IN

This 3rd day of February, 2015

Edward Lee Calvert, Pro Se

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of February, 2015, a copy of the foregoing was mailed, by first class U.S. Mail, to the following:

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Date Feb. 3, 2015

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SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

In re:	:	
	:	**Bankruptcy Case No. 13-13079**
EDWARD LEE CALVERT,	:	**Chapter 7**
Debtor.	:	
	:	
NATIONAL LABOR RELATIONS BOARD,	:	
Plaintiff,	:	**Adv. Pro. No. 15-50001**
	:	
vs.	:	
	:	
EDWARD LEE CALVERT,	:	
Defendant.	:	

STATEMENT OF MATERIAL FACTS NOT IN DISPUTE AND MEMORANDUM OF POINTS AND AUTHORITY IN SUPPORT OF THE NATIONAL LABOR RELATIONS BOARD'S MOTION FOR SUMMARY ADJUDICATION OF NONDISCHARGEABILITY

Plaintiff National Labor Relations Board ("the NLRB") submits this Memorandum of Points and Authorities in support of its Motion for Summary Judgment, seeking a determination that the debt owed to the NLRB by the Defendant Edward L. Calvert ("Calvert") is nondischargeable pursuant to Section 523(a)(6) of the Bankruptcy Code, 11 U.S.C. §523(a)(6); or that Calvert be denied a general discharge in bankruptcy pursuant to Sections 727(a)(3) and (a)(4) of the Bankruptcy Code, 11 U.S.C. §§ 727(a)(3) and (4).

The NLRB's claim against Calvert is remedial, predicated on an order of the National Labor Relations Board finding that Calvert unlawfully retaliated against his employees for their support of, and activities on behalf of, a labor union and thereby injured them by depriving them of their rights as guaranteed by Section 7 of the National Labor Relations Act ("the Act"), 29

U.S.C. § 161 *et seq.*[1] The NLRB found that Calvert responded to his employees' efforts to seek union representation by unlawfully terminating them as part of a scheme to maintain the operation of his business through third party labor providers – his aim being to deny his employees their rights to union representation by ending their legal status as his employees. By these actions, in violation of the statutorily protected rights of his employees, Calvert willfully and maliciously injured his employees within the meaning of Section 523(a)(6) of the Bankruptcy Code. The NLRB's claim – the monetary damages determined by the NLRB to remedy Calvert's unlawful conduct – is therefore nondischargeable.

Further, Calvert has demonstrated that he is not the "honest but unfortunate debtor" entitled to a discharge in bankruptcy. Specifically, in his schedules and during sworn testimony Calvert made statements regarding his principal personal asset – namely the repayment of moneys by his son Kevin – that are inconsistent and ambiguous and, critically, he has failed to provide requisite documentation in support of his testimony. Further, Calvert provided false testimony in an attempt to understate his income during the relevant time period. Confronted with inconsistencies between his testimony and his filings with this Court, Calvert has continuously refused to engage in the open and honest discussion of his financial affairs that bankruptcy proceedings require of a debtor. Calvert's evasiveness and his cavalier disregard for the oath taken

[1] The National Labor Relations Act, as amended, separates the NLRB's prosecutorial and adjudicatory functions. Section 3(d) of the Act establishes the position of General Counsel and vests him with "final authority, on behalf of the Board, in respect of the investigation of [unfair labor practice] charges and issuance of complaints . . . , and in respect of the prosecution of such complaints before the Board." 29 U.S.C. § 153(d). Section 3(a) of the Act, *id.* § 153(a), creates within the Agency a five-member Board, which is empowered by Section 10(a), *id.* § 160(a), to adjudicate unfair labor practice complaints brought by the General Counsel, and by Section 9, *id.* § 159, to process petitions for union representation elections and to certify the results of such elections.

when filing his bankruptcy petition demonstrate disdain for the integrity of the bankruptcy process. Therefore, he should be denied a discharge pursuant to Sections 727(a)(3) and (a)(4).

As detailed below, the pleadings, taken together with Calvert's sworn statements in this and prior proceedings, establish the elements of the NLRB's Complaint. Insofar as there are no genuine issues of material fact, the NLRB is entitled to summary judgment.

I. STATEMENT OF MATERIAL FACTS NOT IN DISPUTE

Based upon the NLRB's Complaint, Defendant's Answer, the record of the bankruptcy proceedings, and supporting documents submitted by the NLRB, there is no genuine issue as to the following facts:

A. Calvert Unlawfully Discriminates Against His Former Employees

1. On July 29, 2005, the NLRB issued a decision and order finding that ELC Electric, Inc. ("ELC") had committed certain unfair labor practices in violation of the National Labor Relations Act. Exh. A ("NLRB Order I").[2] In pertinent part, the NLRB found the following facts:

a. Calvert was president and sole owner of ELC Electric. Exh. A, at 1205 fn. 4; 1213.

b. ELC committed numerous unfair labor practices in retaliation against its then employees because they had engaged in a union organizing effort that culminated in an election,

[2] In his Answer, Calvert does not – indeed, he cannot, as these are matters of public record - deny that the NLRB's administrative proceedings took place, that they resulted in administrative orders, and that they were enforced by the United States Court of Appeals for the Seventh Circuit Court of Appeals. Instead, he disputes the findings themselves, improperly attempting to relitigate the underlying case. (Answer, ¶ 8). As shown below, Calvert is precluded by the doctrine of collateral estoppel from such relitigation.

on September 26, 2002, to determine if ELC's employees would be represented by a labor union for the purposes of collective bargaining. Exh. A, at 1209.

c. ELC's unfair labor practices interfered with the election results and accordingly the NLRB ordered that the results be set aside and a new election held. Exh. A, at 1200).

d. Among those unfair labor practices was the unlawful discriminatory discharge of 16 employees. Exh. A, at 1220). More specifically:

i. In January and February 2003, ELC terminated the employment of Mikalis Grunde, Bruce Sanderson, and Jonathan Trinosky; and

ii. On March 14, 2003, ELC discharged thirteen employees who constituted the remainder of its rank-and-file workforce.

e. ELC's lay-offs of Grunde, Sanderson, and Trinosky were unlawfully motivated by anti-union animus and were an unlawful violation of their rights to engage in activity protected by the National Labor Relations Act. Exh. A, at 1219.

f. Ed Calvert alone made the decision to discharge ELC's remaining 13 electrical employees on March 14, 2003. *Id.* at 1219. His intention was to thwart his employees' pursuit of union representation by terminating them as ELC employees while continuing to avail himself of their services as employees of labor contractors. Thus, Calvert "laid off [ELC's] employees on March 14, 2003, because of their union activities, to wit, to avoid having further NLRB proceedings and the risk that the Union might ultimately be certified as the collective-bargaining representatives of its employees." *Id.* at 1219. In other words, his scheme was to outsource his labor force: if they are not his employees, they cannot exercise their right to unionize.

g. ELC's actions unlawfully interfered with, restrained, and coerced employees

in the exercise of the rights guaranteed them by Section 7 of the Act. Exh. A, at 1203-1204; 1220-22.

h. To remedy these unfair labor practices, the NLRB ordered ELC, its officers, agents, successors, and assigns, to, *inter alia*, make whole the employees that it had terminated in retaliation for their union activities in violation of Section 8(a)(3) and (1) of the Act. Exh. A, at 1221.

2. On November 8, 2012, the NLRB issued a supplemental decision and order. Exh. B ("NLRB Order II,"). There, the NLRB found:

a. That Calvert had created new corporate identities, Midwest Electric & Retail Contractors, Inc. and Asset Management Partners, Inc., for the express purpose of avoiding ELC's liability under NLRB Order I; that both were alter egos of ELC; and that Calvert disregarded the separateness of the corporate identities, commingled corporate funds with his own, and diverted funds, by which he "sought to evade his legal obligations to pay the backpay owed to the 16 discriminatees." Exh. B, at 15.

b. That Edward Calvert was personally liable for the backpay award, jointly and severally with the other respondents, because "[a]llowing him to shirk his backpay obligation by such conduct would work a manifest injustice and be untenable." Exh. B, at 9.

c. To remedy these unfair labor practices, the NLRB directed Calvert, ELC, and the newly created entities Midwest Electric & Retail Contractors, Inc., and Asset

Management Partners, jointly and severally, to pay $437,427, plus interest. (Exh. B, at 10.[3]

3. On June 20, 2013, the Seventh Circuit entered a judgment enforcing the NLRB's order and the Circuit enforced the modified order on July 23, 2013. Exh. C.

B. Calvert concealed, falsified, and/or failed to keep or preserve financial records

4. On December 19, 2013, Calvert filed a Chapter 7 petition currently pending in this Court seeking a discharge of his debts under Section 727 of the Bankruptcy Code. Case 13-13079, Docket # 1.

5. On December 19, 2013, Calvert filed Schedules A-J and his Statement of Financial Affairs in Case 13-13079 (Case 13-13079, Docket #1).

6. At the initial meeting of the creditors on January 28, 2014, Calvert swore under oath to having reviewed his bankruptcy petition, schedules and statement of financial affairs before they were executed, and further that they were true and accurate. (Exh. D, at 4).

7. On Schedule B, Calvert lists personal property valued at $300,219.76. Of that, $274,000, or 91% of the total, is stated to be "Loans to Kevin Calvert, son." Schedule B, item 16 (Accounts receivable).

8. On November 19, 2012, Calvert gave sworn deposition testimony in relation to a prejudgment writ of garnishment proceeding brought by the NLRB in the United States District Court for the Southern District of Indiana in Case 1:13-mc-00130-RLY-MJD. There, Calvert stated that between October 2006 and September 2010 he loaned close to $521,500 to his son Kevin Calvert and $23,500 to his daughter Katrina Stringer a/k/a Katrina Calvert. Exh. E, at 19-20.

[3] The NLRB's Proof of Claim, for $435,382, comprises $399,222 in backpay, reflecting amounts recovered to a protective restraining order in district court case No. 1:13-mc-00130 (S.D. Ind.), plus accrued interest computed as of November 30, 2013. Case 13-13079 Claim 5-1.

9. During an April 24, 2014 examination pursuant to Rule 2004, Calvert testified that the loans made to his son Kevin were, for the most part, formalized in promissory notes. Exh. F, at 34, 36. During that examination, Calvert testified that most of those promissory notes were signed by him and by his son Kevin on the date of each transaction. Exh. F, at 48-49, 61-62. Calvert testified that he maintained the signed notes in a folder in his desk and "at one time I had a bunch signed." Exh. F, at 61. Calvert maintains in his answer to the NLRB's complaint that the loans were memorialized in promissory notes, but that he cannot find those notes. Answer, ¶ 12 (e)-(g).

10. During an August 14, 2014 examination pursuant to Rule 2004 in the underlying Bankruptcy Proceeding, Calvert was unable to explain, with any degree of clarity, how much money he was claiming to have loaned to Kevin. At one point he testified that between January 1, 2009 and August 12, 2012, he wrote checks payable to Kevin totaling $340,000, and that this represented the amount of the loans he had made to Kevin. Exh. G, at 54. Later during that examination, Calvert testified that the amount given to Kevin was $376,000, and took place over a longer period of time. Exh. G, at 57, and later still that it was $318,650; Exh. G, at 57-58.

11. Also during that examination, the NLRB questioned Calvert about a spreadsheet that he had prepared and produced to the NLRB that purported to set forth the origin and amount of each loan to Kevin. Calvert, however, was unable to answer the NLRB's questions concerning the document and conceded that he did not know what information the document actually contained. Exh. G, at 55-57.

12. When asked why none of these various totals matched the $274,000 listed on Schedule B of his bankruptcy petition, Calvert testified that the number on the Schedule was one-half of the total loaned amount, averring that although he wrote the checks to Kevin half of

the loans came from his wife, Linda Calvert. Exh. G, at 58). In his Answer, Calvert states that he and his wife together loaned Kevin $545,000. Answer, ¶ 12(b).

C. Calvert has made false statements in connection with the bankruptcy proceeding

13. Calvert's Statement of Financial Affairs, Item 1 states that his only income from employment or operation of a business was rental payments in 2011, 2012, and 2013. Case 13- 13079, Docket No. 1. During the January 28, 2014 First Meeting of Creditors, Calvert testified that his income was derived solely from social security and rental income, which had since expired. Exh. D, at 10. When the Trustee asked if Calvert had any sources of income other than social security, Calvert said he did not. Exh. D, at 12. Calvert testified that his son Kevin Calvert had been giving money to Calvert's wife, Linda, on an "as-needed basis" as repayment for the loans that she had given Kevin, but that Calvert himself had not received any income from his son. Exh. D, at 10-11.

14. During the August 14, 2014 Rule 2004 examination, Calvert testified, "No, I've not had any business. I had helped a person with a little project that he had, but I have not -- I did not have any business, nor have I ever had [sic] any business." Exh. G, at 30. Asked about the $9,090 listed as business income on his 2013 federal income tax return, Calvert stated it was payment by people that he had "helped." Exh. G, at 30.

15. Questioned further, Calvert admitted to performing consulting work for Thomas Blankenship that consisted of overseeing a construction project, and that he received compensation for this work. Exh. G, at 30-32. Calvert further admitted to performing consulting work for Tellis Roberts that included the renovation of a building where Calvert used to operate his defunct business ELC Electric. Calvert had sold the building to his son Kevin, who then hired Tellis Roberts to perform the renovation, who

had in turn hired Calvert to manage the project. Calvert was compensated for this work. Exh. G, at 33.

16. Calvert issued invoices for his consulting services performed during 2013 under the business name "Express Consulting" with a business address of 3960 Southeastern Avenue, Indianapolis, IN. Exh. H, at 12-13. The invoices bear the company's name and address, but not Calvert's name. Payments for those invoices were made directly to Calvert. Exh. H, at 18-19. Interior Specialists, which was owned by Tellis Roberts, later issued invoices for Calvert's work and paid money to Calvert. Exh. H, at 17, 18.

17. Calvert's Statement of Financial Affairs, Item 18 – "Nature, location and name of business" does not list Express Consulting. (Case 13-13079, Docket No. 1). Additionally, in his Statement of Financial Affairs, Item 1– "Income from employment or operation of business," Calvert did not list any of his consulting income from employment, including a $10,000 check he received eight days prior to filing. Exh. I.

18. In Calvert's Schedule B – Personal Property, in which he is instructed to include property "held for the debtor by someone else," Calvert claims to have no assets in category #2 (Checking, savings or other financial accounts). Case 13-13079, Docket No. 1. Additionally, during the First Meeting of Creditors, Calvert stated that he had made no transfers to any other person, including his wife and children, in the year prior to filing. Exh. D, at 16.

19. The only bank account held by either Ed or Linda Calvert from August 2012 through May 2014, was Linda's Chase account. (8-14-14 Deposition, at 19, 27). Calvert deposited the compensation he received for the work performed as Express Consulting into his wife Linda's bank account. Exh. G, at 34. From March 2012 through September 2013,

Calvert deposited over $22,000 in Linda's chase account. Exh. H, at 26. Calvert drew money from Linda's account as needed and used it to pay bills. Exh. E, at 12-17. Calvert's Bankruptcy Schedules do not make a single reference to Linda Calvert's bank account.

20. In Calvert's Schedule B – Personal Property, Calvert claims in category #1 (Cash on hand), $10 located "on person." (Case 13-13079, Docket No. 1). Moreover, as indicated above, during the January 28, 2014 First Meeting of Creditors, Calvert testified that his income was derived solely from social security. Exh. D, at 12. However, on December 9, 2013, just eight days prior to filing his petition, Calvert received a check in the amount of $10,000 from Interior Specialties, Inc. Exh. I.

21. Calvert had a practice of saving cash at his home. Exh. H, at 38. This included rental income which was regularly paid to him in cash and other sums of cash that he obtained from other businesses Exh. H, at 32-33. Calvert claimed that he was "not real sure" when these cash reserves were depleted, only that it was "before I filed for bankruptcy." Exh. H, at 34. When asked if the cash had been depleted for a few months, weeks, or days before he filed, he could only say, "I am not sure." *Ibid.* However, Calvert testified that there might still be an unspecified amount of cash in his home that he says belongs to his wife. Exh. H, at 28.

II. ARGUMENT

Summary Judgment is appropriate where, "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Armato v. Grounds*, 766 F.3d 713, 719 (7th Cir. 2014). The party moving for summary judgment has the burden of showing that no genuine issue of material fact is in dispute. Id.; *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986)). Although a court must view the evidence in a light most favorable to the non-moving party, "the non-moving party must

come forward with specific facts showing that there is a genuine issue for trial." *Armato v. Grounds*, 766 F.3d at 719 (citing *Matsushita Elec. Indus. Co., Ltd. V. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)); *In re Smith*, No. 13-41180, 2015 WL 412326, at *5 (Bankr. S.D. Ill. 2015).

A. Calvert Inflicted Willful And Malicious Injury To His Employees That Gave Rise To His Debts To The NLRB

The material facts supporting the NLRB's §523(a)(6) claim have all been adjudicated in the NLRB's unfair labor practice proceeding. The operative facts, along with relevant legal conclusions, are set forth as findings and conclusions in the NLRB's Decision and Order in NLRB Order I. Administrative proceedings, such as unfair labor practice hearings conducted by the NLRB, are entitled to collateral estoppel effect. *Astoria Federal Sav. and Loan Ass'n v. Solimino*, 501 U.S. 104, 107 (1991). Courts give preclusive effect to findings of an administrative agency acting in a judicial capacity for resolving disputed issues properly before it where parties have had an adequate opportunity to litigate. *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 422 (1966); *Alvear–Velez v. Mukasey*, 540 F.3d 672, 677 (7th Cir. 2008)); *see also Hamdan v. Gonzales*, 425 F.3d 1051, 1059 (7th Cir. 2005) ("*Res judicata* applies to administrative proceedings . . . ."). Further, collateral estoppel principles apply in nondischargeability proceedings under Section 523(a) of the Bankruptcy Code. *Grogan v. Garner*, 498 U.S. 279, 284 n. 11 (1991); *In re Wallace*, 840 F.2d 762, 764-65 (10th Cir. 1988); *In re Piper*, 170 LRRM 2282, 2283 (Bankr. E.D. Mich. 2002); *In re Fogerty*, 204 B.R. 956, 959 (Bankr. N.D. Ill. 1996) (debtor bound by prior judgment).

A litigant in an adversary proceeding to determine nondischargeability is estopped from relitigating factual or legal issues that were determined in a prior proceeding, provided that: (1) the issue sought to be precluded is the same as that involved in the prior litigation, (2) the issue

must have been actually litigated, (3) the determination of the issue must have been essential to the final judgment, and (4) the party against whom estoppel is invoked must have been fully represented in the prior action. *Matrix IV, Inc. Am. Nat'l Bank & Trust Co.*, 649 F.3d 539, 547 (7th Cir. 2011) (citing *H–D Mich., Inc. v. Top Quality Serv., Inc.*, 496 F.3d 755, 760 (7th Cir. 2007)); *Brandt Indus., Ltd. v. Pitonyak Mach. Corp.*, No. 1:10-CV-0857-TWP-DML, 2012 WL 3257886, at *5-6 (S.D. Ind. 2012).

The elements of nondischargeability under Section 523(a)(6) are the same as issues that were fully litigated and necessary to the prior NLRB adjudications. Section 523(a)(6) excepts from discharge debts for "willful and malicious injury by the debtor to another entity or to the property of another entity." 11 U.S.C. § 523(a)(6). The Seventh Circuit has noted that courts have found different ways to analyze this terminology, but that "all courts would agree that a willful and malicious injury, precluding discharge in bankruptcy of the debt created by the injury, is one that the injurer inflicted knowing he had no legal justification and either desiring to inflict the injury or knowing it was highly likely to result from his act." *Jendusa-Nicolai v. Larson*, 677 F.3d 320, 324 (2012). Bankruptcy courts in the Seventh Circuit "have focused on three points: (1) an injury caused by the debtor (2) willfully and (3) maliciously." *First Weber Grp., Inc. v. Horsfall*, 738 F.3d 767, 774 (7th Cir. 2013). And, the Seventh Circuit has noted, "as with all exceptions to discharge, the burden is on the creditor to establish these facts by a preponderance of the evidence." *Ibid.*

The term "injury" is understood to mean a "violation of another's legal right, for which the law provides a remedy." *Horsfall*, 738 F.3d at 775 (quoting *In re Lymberopoulos*, 453 B.R. 340, 343 (Bankr. N.D. Ill. 2011)).

Willfulness requires "a deliberate or intentional *injury*, not merely a deliberate or intentional *act* that leads to injury." *Kawaauhau v. Geiger*, 523 U.S. 57, 61 (1998) (emphasis in original). "Willfulness" can be found either if the "debtor's motive was to inflict the injury, or the debtor's act was substantially certain to result in injury." *Id.*; *see also In re Smith*, No. 13-6765-RLM-7, 2014 WL 792042, at *5 (Bankr. S.D. Ind. Feb. 25, 2014) (a plaintiff must show that the defendant inflicted the injury knowing "she had no 'legal justification' or knowing that the injury was highly likely to result from her acts.")

Lastly, maliciousness requires that the debtor have acted "in conscious disregard of [his] duties or without just cause or excuse; it does not require ill-will or specific intent to do harm." *First Weber Grp., Inc. v. Horsfall*, 738 F.3d 767, 775 (7th Cir. 2013) (quoting *Matter of Thirtyacre*, 36 F.3d 697, 700 (7th Cir. 1994). Put another way, a finding of malice may be predicated on reckless disregard alone. *In re Wolf*, 519 B.R. 228, 250 (Bankr. N.D. Ill. 2014). Debtor's "malicious" intent can be shown by evidence that debtor had knowledge of employees' rights and that, with that knowledge, proceeded to take action in violation of those rights. *Jenkins v. IBD, Inc.*, 489 B.R. 587 (D. Kan. 2013).

Because these elements have been established after full litigation in the NLRB proceedings, Calvert is barred from relitigating them here. The NLRB acted within is statutory authority in conducting the underlying administrative proceedings resulting in NLRB Order I and the Supplemental Proceeding in NLRB Order II. The operative issues here – whether Calvert caused intentional and malicious injury to the employees whose claims the NLRB presents – were litigated in and essential to the NLRB's Decision and Order, which has been enforced by the Seventh Circuit. Moreover, Calvert was fully represented in that proceeding. Indeed, he

admits that he "vigorously denied and disputed allegations of unfair labor practices alleged at NLRB hearings in 2003 and 2005. Answer, ¶ 8.[4]

It is precisely Calvert's conduct, as established in the prior proceeding, that underpins the NLRB's position that its claim against him is nondischargeable pursuant to Section 523(a)(6). Calvert's direct personal involvement in devising and carrying out an unlawful campaign to deny his employees their organizational rights has been specifically litigated. All 16 discharges were unlawfully motivated as retaliation for union activities and in furtherance of Calvert's unlawful stratagem to "avoid having further NLRB proceedings and the risk that the Union might ultimately be certified as the collective-bargaining representatives of its employees" by terminating them as employees of his company and resurrecting them as employees of labor providers. Exh. A, at 1219. Indeed, the NLRB found that the decision to unlawfully discharge 13 of the 16 employees was his and his alone. As shown below, Calvert's actions in carrying out the unfair labor practices against his employees were willful and malicious within the meaning of Section 523(a)(6).

The NLRB necessarily found that Calvert's employees suffered injury in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act. The NLRB found that Calvert, who was the sole owner of ELC, waged an illegal antiunion campaign that unlawfully interfered with his employees' statutory rights to organize for purposes of collective bargaining and to support a labor organization. ELC, a corporation over which Calvert "had sole and total control," Exh. B, at 8, first discharged three members of the union organizing

[4] Calvert protests, Answer ¶8(c), that he was denied the opportunity to appear before the NLRB to rebut the findings of the Administrative Law Judge and demonstrate the Judge's bias. In fact, Calvert filed exceptions to both NLRB Order I and NLRB Order II. Exh. A, at 1200 n.3 & Exh. B, at 1, n.2. With regard to Calvert's claim the "the judge's rulings, findings, and conclusions demonstrate bias and prejudice, the NLRB, upon careful consideration of the judge's decision and the entire record, found Calvert's contentions to be meritless. Exh. B, at 1, n.2.

committee, then discharged the remainder of its workforce, consisting of 13 employees, without a legitimate business reason and, in fact, to "avoid having further NLRB proceedings and the risk that the Union might ultimately be certified as the collective-bargaining representatives of its employees." Based on this finding, the NLRB determined that Calvert discharged ELC's entire workforce because they had engaged in statutorily protected conduct and to discourage them from engaging in further such protected conduct in violation of Section 8(a)(3) of the National Labor Relations Act. Exh. A, at 1219. Thus, because an "injury" – the unlawful discrimination against employees for exercising their federally protected rights – was a required element of the Section 8(a)(3) claim litigated in the NLRB proceedings, the issue of whether an "injury" pursuant to Section 523(a)(6) has occurred has been litigated, was necessary to the NLRB's order, and should be given preclusive effect.

That Calvert inflicted this injury upon his employees willfully and intentionally has also been litigated. The NLRB's finding that Calvert violated Section 8(a)(3) of the National Labor Relations Act by discriminatorily discharging his employees necessarily entailed a finding as to Calvert's motive. *See, e.g., Van Vlerah Mechanical v. NLRB*, 130 F.3d 1258, 1263 (7th Cir. 1997) (determination as to the employer's motivation is necessary to find a violation of Section 8(a)(3) of the Act); *Chinese Daily News*, 353 NLRB 613, 623 (2008) (in determining whether an employer's conduct violates Section 8(a)(3), "discriminatory intent must be shown"). The NLRB found specifically that Calvert's overall objective in discharging his employees from ELC was to "avoid having further NLRB proceedings and the risk that the Union might ultimately be certified as the collective-bargaining representatives of its employees." Exh. A, at 1219. The injury to his employees—denying them their statutory rights to organize for purposes of collective bargaining and support a labor organization—was the mainspring of Calvert's plan;

i.e. to remove any prospect that he would have to recognize and deal with a collective-bargaining representative for his employees. In sum, the NLRB determined that Calvert's conscious purpose in discharging his employees was to rid himself of a workforce capable of exercising its statutory right to organize a union, and thereby established his willful intent to discriminatorily discharge his employees in violation of their Section 7 rights.

Other courts that have examined this issue have concluded that discriminatory conduct against employees in violation of the National Labor Relations Act is a "willful and malicious" injury within the meaning of Section 523(a)(6). *In re Fogerty*, 204 B.R. at 962; *In re Piper*, 170 LRRM at 2284; *In re Branoff*, 165 LRRM 2757, 2759-60 (Bankr. E.D. Mich. 2000); but see *NLRB v. Gordon (In re Gordon)*, 303 B.R. 645 (Bankr. D. Colo.2003) (denying the NLRB's motion for summary judgment based on NLRB order). Moreover, "there are numerous cases in which courts have found sexual harassment and retaliation judgments vulnerable to exception from discharge in bankruptcy under section 523(a)(6)."[5] *In re Goldberg*, 487 B.R. 112, 126 (Bankr. E.D. N.Y. 2013).

Moreover, *NLRB v. Gordon* is not to the contrary. Although the court found that the judgment enforcing the NLRB's order "was a final judgment entitled to preclusive effect as to

[5] *See, e.g., Sells v. Porter (In re Porter)*, 539 F.3d 889, 894 (8th Cir.2008) (sexual harassment found non-dischargeable using collateral estoppel); *Jones v. Svreck (In re Jones)*, 300 B.R. 133, 137 (1st Cir. BAP 2003) (sexual harassment found non-dischargeable using collateral estoppel); *Basile v. Spagnola (In re Spagnola)*, 473 B.R. 518, 522 (Bankr.S.D.N.Y.2012) (sexual harassment found non-dischargeable using collateral estoppel); Petro v. Miller (In re Miller), 403 B.R. 804, 816 (Bankr. W.D. Mo. 2009) (racial discrimination found non-dischargeable using collateral estoppel). *Cf. Wright v. Blythe–Nelson*, No. Civ. A. 399CV2522D, 2004 WL 1923871, at *1 (N.D. Tex. Aug. 24, 2004) (sexual harassment found non-dischargeable after trial); *Ford–Torres v. O'Shea (In re O'Shea)*, No. 07–6084, 2010 WL 2901624, at *3–4 (Bankr. D. Or. July 21, 2010) (retaliation claim found non-dischargeable after trial); *Nesler v. Thomason (In re Thomason)*, 288 B.R. 812, 815 (Bankr. S.D. Ill. 2002) (wrongful termination found non-dischargeable after bankruptcy court trial); *In re Wilson*, 216 B.R. 258 (Bankr. E.D. Wis. 1997) (gender-based discrimination).

legal and factual issues which were decided in those proceedings," 303 B.R. at 659, it was not sufficient for entry of summary judgment because it was unclear, based on the given record, that the NLRB had adjudicated the factual issue as to whether the injury suffered by the former employees of Debtor's business entities was intentionally inflicted. *Ibid.* Had the NLRB "made specific findings of fact with respect to Gordon's intent as to the employees themselves, then under the doctrine of collateral estoppel, those findings are binding upon this Court." 303 B.R. 657.

Here, as shown above, the administrative law judge made specific findings regarding Calvert's intent, determining that he purposely discharged his employees to rid himself of a workforce capable of exercising its statutory right to organize a union. See also, *In re Goldberg*, 487 B.R. 112 (Bankr. E.D. N.Y. 2013), where the court, in considering a motion for summary judgment, found a state human rights statute did not explicitly require a showing of intent, but that the requisite intent was implicit in the underlying judgment. The court observed that findings of discrimination and retaliation, when applying a burden shifting analysis like that applied by the NLRB[6], were "necessarily grounded in a factual record sufficient to establish that the adverse employment action was motivated by unlawful discriminatory animus; that is, that the employer's conduct was intentional." *Id.* at 127. Further, "where an employer's deliberate conduct is found to constitute unlawful discrimination against an individual employee, it necessarily follows that such intent was for the purpose of causing injury." *Ibid.*

[6] With respect to alleged violations of Section 8(a)(3), employer motivation must be analyzed under *Wright Line*, 251 NLRB 1083 (1980), enforced, 662 F.2d 899 (CA1 1981), cert. denied 455 U.S. 989 (1982). Accordingly, the General Counsel must first show, by a preponderance of the evidence, that protected conduct was a motivating factor in the employer's adverse action. Once the General Counsel makes that showing, the burden of persuasion shifts to the employer to show that it would have taken the same adverse action even in the absence of the protected activity. *Chinese Daily News*, 353 NLRB 613, 623 (2008).

Calvert contends that he had no intention to cause harm to his employees and, in fact, explains that when he notified employees that they would be discharged he simultaneously referred them to an independent labor provider with a guarantee of continued employment on the ELC projects at which they were working. Answer, ¶4/5 (b) and (c). But Calvert need not have intended to cause his employees *financial* harm for his willful injury to be nondischargeable pursuant to Section 523(a)(6). *Jendusa-Nicolai v. Larson*, 677 F.3d 320, 324 (2012) (a willful and malicious injury precludes discharge in bankruptcy of the debt created by the injury, including remedial judgment debts). He need only have "willfully" caused an injury, which he did when he intentionally deprived his employees of their statutory rights in direct contravention of federal labor law – an injury that NLRB unequivocally determined was intentionally perpetrated by Calvert.

Calvert's willful injury created a financial backpay obligation; "a reparation order designed to vindicate the public policy of the [National Labor Relations Act] by making employees whole for losses suffered on account of an unfair labor practice." *Nathanson v. NLRB*, 344 U.S. at 27. But it was the actual unlawful discrimination that constitutes the injury. In sum, the backpay Calvert owes his former employees is a "debt *consequent upon* a willful and malicious injury" to their statutory rights. *Jendusa-Nicolai v. Larson*, 677 F.3d at 322 (punitive damages from state tort action found nondischargeable) (emphasis added). *See also In re Goldberg*, 487 B.R. at 129 ("in a case involving overt acts that constitute intentional discrimination, it defies rationality to suggest that the Debtor's conduct was objectively benign").

Finally, the NLRB's order also precludes relitigation of Calvert's malice. The NLRB determined that Calvert, acting on his animus toward the union and the protected conduct of his employees, discharged employees in a scheme to avoid the prospect that the union might

ultimately be certified as the collective-bargaining representatives of his employees. Finding that Calvert acted without legitimate business purpose, the NLRB determined that Calvert violated the statutory rights of his employees without just cause or excuse. *See In re Fogerty,* 204 B.R. at 961 (an act is "'malicious' if it is either wrongful and without just cause or excuse or committed in the face of knowledge that harm to the injured party will necessarily result, even in the absence of personal ill will or a specific intent to injure"). The NLRB's findings indisputably establish that Calvert acted in a conscious and reckless disregard for the statutory rights of his employees.

C. Calvert Failed To Keep Or Preserve Necessary Financial Records Of His Transactions With His Son Kevin Calvert

Section 727(a)(3) of the Bankruptcy Code provides that the court shall not grant the debtor a discharge if "the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained . . . ." 11 U.S.C. § 727(a)(3). "The purpose of § 727(a)(3) is to make the privilege of discharge dependent on a true presentation of the debtor's financial affairs." *In re Scott,* 172 F.3d 959, 969 (7th Cir. 1999) (quoting *Cox v. Lansdowne (In re Cox),* 904 F.2d 1399, 1401 (9th Cir. 1990)). This section confers to the debtor an obligation to reveal his complete financial condition, an obligation that Calvert manifestly did not take seriously.

The courts and creditors should not be required to speculate as to the financial history or condition of the debtor, nor should they be compelled to reconstruct the debtor's affairs. *Matter of Juzwiak,* 89 F.3d 424, 428 (7th Cir. 1996). A creditor "should not be forced to undertake an independent investigation of a debtor's affairs; rather they have a right to be supplied with dependable information on which they can rely in tracing a debtor's financial history." *Id.*;

accord In re Self, 325 B.R. 224, 244 (Bankr. N.D. Ill. 2005). Consequently, "Section 727 makes complete financial disclosure a 'condition precedent' to the privilege of discharge . . . ." *United States v. Ellis*, 50 F.3d 419, 424 (7th Cir. 1995) (internal citations omitted). *See also Matter of Juzwiak*, 89 F.3d 424, 427 (7th Cir. 1996) (as a precondition to discharge, debtors are required to produce records which provide creditors "with enough information to ascertain the debtor's financial condition and track his financial dealings with substantial completeness and accuracy for a reasonable period past to present"); *Meridian Bank v. Alten*, 958 F.2d 1226, 1230 (3d Cir.1992). Intent to deceive, or conceal information, is not a requisite element for denying a discharge under Section 727(a)(3). *In re Scott*, 172 F.3d 959, 969 (7th Cir. 1999); *Matter of Juzwiak*, 89 F.3d 424, 430 (7th Cir. 1996); *In re Wasserman*, 332 B.R. 325, 335 (Bankr. N.D. Ill. 2005).

Calvert has failed to maintain and preserve records that are critical to reviewing monetary transactions with his son and determining his overall financial condition. With respect to the more than $500,000 that Calvert transferred to his son Kevin, he has failed to produce the signed promissory notes reflecting the terms and amount of those loans. While the NLRB has obtained Calvert's checks and bank statements, these records do not enable the NLRB to discern the terms of those loans or to determine how much of Kevin's debt should be attributed to Calvert's estate. The significance of this issue is highlighted by Calvert himself claiming only one-half the value of this asset for himself and by his ongoing contention that the other half belongs to his wife, Linda. This stratagem has allowed money to flow freely from Calvert to Kevin and then back into the Calvert household, but outside of Ed Calvert's estate. Calvert's failure to furnish these records, along with his vague and shifting testimony on the subject, has left the character of these transactions shrouded in uncertainty.

With respect to the terms under which Calvert transferred more than $500,000 to his son Kevin, Calvert asks the court and creditors to take him at his word. However, "[o]ral testimony is not a valid substitute or supplement for concrete written records." *Juzwiak*, 89 F.3d at 429. Creditors are not required to rely solely on oral testimony regarding the details of certain monetary disbursements. Accordingly:

> It is not enough that Debtor merely recite from records ostensibly "kept in his head" and detail from memory what transactions he engaged in and how the funds were dissipated. Records of substantial completeness and accuracy are necessary *in order that they may be checked against Debtor's oral statements.* Creditors, in other words, are not required to rely on a debtor's oral representations concerning these matters without also having some independent means of substantiating such representations.

Id. at 428 (quoting *In re Rusnak*, 110 B.R. 771, 776 (Bankr. W.D. Pa. 1990)). Without the executed promissory notes, detailing who provided the loans to Kevin and the terms of repayment, the NLRB is left to speculate as to the character of these transactions. The NLRB is entitled to the written documentation. *See In re Rusnak* 110 B.R. at 776; *In re Pimpinella*, 133 B.R. 694, 698 (Bankr. E.D.N.Y. 1991); *In re Schultz*, 71 B.R. 711, 716 (Bankr. E.D. Pa. 1987); *In re Shapiro*, 59 B.R. 844, 848 (Bankr. E.D.N.Y. 1986)("the trustee and creditors are therefore not required to take the debtor's word as to his financial situation").

Calvert's explanation that he cannot find the executed promissory notes does not excuse his duty to maintain these records under § 727(a)(3). *See In re Schultz*, 71 B.R. 711, 717 (Bankr. E.D. Pa. 1987) (inability to locate records because of poor record keeping an insufficient excuse; court denied discharge). Calvert's insistence that the NLRB rely on the unsigned notes that he has since generated is especially unacceptable given the discrepancies in Calvert's testimony concerning the nature and amount of his financial transactions with Kevin. Calvert has failed to maintain records from which his financial condition can be ascertained, and therefore should be denied a discharge under Section 727(a)(3).

D. Calvert Made False Statements Concerning His Business Activities And Income To Intentionally Defraud His Estate

Under Section 727(a)(4)(A), a court will deny a debtor a discharge if the debtor "knowingly and fraudulently, or in connection with the case . . . made a false oath or account." "Whether a debtor made a false oath within the meaning of § 727(a)(4) is a question of fact." *In re Lindemann,* 375 B.R. 450, 469 (Bankr. N.D. Ill.2007). To preclude discharge, the plaintiff must establish by a preponderance of the evidence that: the debtor made a statement under oath; the statement was false; debtor knew the statement was false; debtor made the statement with fraudulent intent; and the statement related materially to the bankruptcy case. *In re Neal,* No. 06-07116-JKC-7A, 2009 WL 684793, at *2 (Bankr. S.D. Ind. 2009). With respect to fraudulent intent, the court must find that the debtor knowingly intended to defraud or engaged in such reckless behavior as to justify a finding of fraud. *Id.* at *2-3; *In re Yonikus,* 974 F.2d 901, 905 (7th Cir.1992). Intent to defraud may be proven by direct evidence, or inferred from circumstantial evidence and the debtor's course of conduct. *See Yonikus,* 974 F.2d at 905; *In re Costello,* 299 B.R. 882, 900 (Bankr. N.D. Ill. 2003). Reckless disregard means "not caring whether some representation is true or false . . . ." *In re Chavin,* 150 F.3d 726, 728 (7th Cir. 1998). If a debtor's bankruptcy schedules reflect a "reckless indifference to the truth" then the plaintiff seeking denial of the discharge need not offer any further evidence of fraud. *Costello,* 299 B.R. at 900.

Calvert attempted to conceal that he had operated a consulting business and that he had income from that business in the relevant time period prior to filing his bankruptcy petition. This information was omitted from his Schedules, although plainly responsive to Items 1 and 18 of the Statement of Financial Affairs. He continued to conceal these facts at the first meeting of the creditors six weeks later when the trustee asked Calvert to give a complete accounting of all his

income. At that time, Calvert testified that social security and rental income had been his only income during the two years prior to filing. Calvert also failed to disclose that, during the two years prior to filing, he had transferred his income into his wife's bank account. Further, it is clear that his wife's bank account, the sole household account, into which Calvert deposited income and from which his household accounts were paid, was effectively Calvert's asset, at least in part. Calvert was required to either list it as an asset being held for him by his wife, or declare that he had transferred the money to her. He did neither. Calvert perpetuated these omissions during the meeting of creditors when he testified that he had not made transfers to any person, including his wife, in the year prior to filing.

There is no question that the Calvert's receipt of business income, his transfer of that income to his wife, and whether that income remained at Calvert's disposal throughout, is material to the bankruptcy proceeding. Thus, there can be no doubt that the information Calvert provided was false and misleading.

Calvert's omissions regarding his business activity, at the very least, exhibited a reckless disregard for the truth, and are grounds for denying him a discharge. Calvert could not in good faith claim a mistake or misunderstanding when he received a significant amount of income over the year prior to filing, including a $10,000 check a mere eight days prior to his filing for bankruptcy. Exh. I. Nor is it credible that he failed to identify his business, Express Consulting, in his petition and schedules: his explanation that he was not engaged in operating a business because it was not regular is ridiculous. Calvert purposely (1) performed consulting work, (2) issued invoices under a business name of his choosing, rather than his own name, and (3) garnered income from that work. And again, he persisted in this fraudulent concealment when, at

the meeting of the creditors, he testified under oath and without equivocation that his only source of income during the two years prior to his filing had been rental income and social security.

Finally, Calvert provided vague and evasive information concerning his access to cash. Calvert admitted in his bankruptcy petition to having a mere $10 in cash, despite having received a $10,000 check for his consulting business only eight days prior to filing. Calvert subsequently testified in examinations pursuant to Rule 2004 to having no cash while acknowledging his wife might have cash at his home of an unknown amount. These evasions, particularly in view of the revelation that he received a substantial check shortly before filing his petition, further demonstrates Calvert's lack of candor regarding his assets and financial situation.

No mitigating factors that warrant deference to Calvert. He has displayed nothing but disdain for the obligations imposed upon him by the bankruptcy process, failing to give a complete accounting of his estate and intentionally concealing assets from his creditors. "The principal purpose of the Bankruptcy Code is to grant a fresh start to the *honest but unfortunate debtor." Marrama v. Citizens Bank of Massachusetts*, 549 U.S. 365, 367, 127 S.Ct. 1105, 166 L.Ed.2d 956 (2007) (emphasis added, internal quotation marks omitted); see also *Disch v. Rasmussen*, 417 F.3d 769, 774 (7th Cir. 2005). An honest but unfortunate debtor Calvert is not. Because Calvert acted with the fraudulent intent required by Section 727(a)(4)(A), the Court should deny him a discharge in bankruptcy.

III. CONCLUSION

WHEREFORE, the NLRB respectfully requests that the Court grant the NLRB's Motion for Summary Judgment. A proposed Order is submitted herewith.

Respectfully submitted,

NATIONAL LABOR RELATIONS BOARD

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National Labor Relations Board
Contempt, Compliance, & Special Litigation Branch
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Washington, D.C. 20005

Dated at Washington, DC
this 5th day of June, 2015

SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

In re:	:	
	:	Bankruptcy Case No. 13-13079
EDWARD LEE CALVERT,	:	Chapter 7
Debtor.	:	
	:	
NATIONAL LABOR RELATIONS BOARD,	:	
Plaintiff,	:	Adv. Pro. No. 15-50001
	:	
vs.	:	
	:	
EDWARD LEE CALVERT,	:	
Defendant.		

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent this 5th day of June 2015, by first class mail, postage prepaid, and by electronic mail, to the following:

Edward Calvert
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SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

In re:	:	
	:	Bankruptcy Case No. 13-13079
EDWARD LEE CALVERT,	:	Chapter 7
Debtor.	:	
	:	
NATIONAL LABOR RELATIONS BOARD,	:	
Plaintiff,	:	Adv. Pro. No. 15-50001
	:	
vs.	:	
	:	
EDWARD LEE CALVERT,	:	
Defendant.		

INDEX OF EXHIBITS
IN SUPPORT OF THE NATIONAL LABOR RELATIONS BOARD'S
MEMORANDUM OF POINTS AND AUTHORITY IN SUPPORT OF MOTION FOR
SUMMARY ADJUDICATION OF NONDISCHARGEABILITY

Exhibit A	*E.L.C. Elec., Inc.*, 344 NLRB 1200 (2005).
Exhibit B	*E.L.C. Elec., Inc., & Its Alter Ego &/or Successor Midwest Elec. & Retail Contractors, Inc., d/b/a MERC, Inc., & Asset Mgmt. Partners, Inc., A Single Integrated Enter. & Single Employer, & Edward L. Calvert, Individually*, 359 NLRB No. 20 (Nov. 8, 2012).
Exhibit C	Seventh Circuit judgment enforcing the NLRB's order.
Exhibit D	Excerpts from January 28, 2014, Calvert testimony from first meeting of creditors in bankruptcy proceeding.
Exhibit E	Excerpts from November 19, 2012, Calvert testimony from deposition in relation to a prejudgment writ of garnishment proceeding in United States District Court for the Southern District of Indiana.
Exhibit F	Excerpts from April 24, 2014, Calvert testimony from 2004 deposition in bankruptcy proceeding.

Exhibit G	Excerpts from August 14, 2014, Calvert testimony from 2004 deposition in bankruptcy proceeding.
Exhibit H	Excerpts from December 9, 2014, Calvert testimony from 2004 deposition in bankruptcy proceeding.
Exhibit I	Check from Interior Specialists to Express Consulting, dated December, 9, 2013 (Exhibit to December 14, 2014 Deposition).

SO ORDERED: September 1, 2015

James M. Carr
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

IN RE:	)	
	)	
EDWARD LEE CALVERT,	)	Case No. 13-13079-JMC-7A
	)	
Debtor.	)	
	)	
	)	
NATIONAL LABOR RELATIONS BOARD,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Adversary Proceeding No. 15-50001
	)	
EDWARD LEE CALVERT,	)	
	)	
Defendant.	)	

ENTRY ON MOTION FOR SUMMARY JUDGMENT

THIS MATTER comes before the Court on *The National Labor Relations Board's Motion for Entry of Summary Judgment* filed by the National Labor Relations Board ("NLRB") on June 5, 2015 (Docket No. 33) (the "Motion"). The Court, having reviewed and considered

the Motion, including the *Statement of Material Facts Not in Dispute and Memorandum of Points and Authority in Support of the National Labor Relations Board's Motion for Summary Adjudication of Nondischargeability* (Docket No. 33-1) (the "Brief") and all exhibits attached to the Motion, *Defendant's Opposition to National Labor Relations Board's Motion for Summary Judgment Regarding Bankruptcy Case No. 13-13079-JMC-7 and Adv. Pro. No. 15-50001* filed by Edward Lee Calvert ("Calvert") on July 1, 2015 (Docket No. 36) (the "Response"), the *National Labor Relations Board's Reply to Defendant's Opposition to Motion for Summary Judgment* filed on July 14, 2015 (Docket No. 37) (the "Reply") and *Defendant's Reply to National Labor Relations Board's Brief to Defendant's Opposition for Summary Judgment Regarding Bankruptcy Case No. 13-13079-JMC-7 and Adv. Pro. No. 15-50001* filed on July 21, 2015 (Docket No. 38) (the "Surreply"), and being otherwise duly advised, now **DENIES** the Motion.

Summary Judgment Standard

The NLRB moves the Court to enter summary judgment in its favor and against Calvert pursuant to Fed. R. Civ. P. 56, made applicable to this adversary proceeding by Fed. R. Bankr. P. 7056.

To obtain summary judgment, the NLRB must show that there is no genuine dispute as to any material fact and the NLRB is entitled to judgment as a matter of law. Fed R. Civ. P. 56(a). The burden rests on the NLRB, as the moving party, to demonstrate that there is an absence of evidence to support the case of Calvert, the nonmoving party. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 2554 (1986). After the NLRB demonstrates the absence of a genuine issue for trial, the responsibility shifts to Calvert to "go beyond the pleadings" to cite evidence of a genuine issue of material fact that would preclude summary judgment. *Id*. at 324, 106 S.Ct. at

2553. If Calvert does not come forward with evidence that would reasonably permit the Court to find in his favor on a material issue of fact (and the law is with the NLRB), then the Court must enter summary judgment against Calvert. *Waldridge v. American Hoechst Corp.*, 24 F.3d 918, 920 (7th Cir. 1994) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585-87, 106 S.Ct. 1348, 1355-56 (1986); *Celotex*, 477 U.S. at 322-24, 106 S.Ct. at 2552-53; and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-52, 106 S.Ct. 2505, 2511-12 (1986)).

Reasoning

The NLRB filed this adversary proceeding seeking a judgment on two points: (1) "that certain debts owed to Calvert's former employees, to remedy the unlawful injuries he intentionally caused them, are nondischargeable" pursuant to 11 U.S.C. § 523(a)(6);[1] and (2) "that Calvert should be denied a discharge in bankruptcy" pursuant to § 727(a)(3) and (4). (Motion, p. 1.)

§ 523(a)(6)

The NLRB asserts that the unfair labor practice proceedings conducted by the NLRB (and the written decisions thereon containing the findings of administrative law judge Ira Sandron ("ALJ") and the decisions and orders of the NLRB) are entitled to collateral estoppel effect, and that the elements of § 523(a)(6) are "the same as issues that were fully litigated and necessary to the prior NLRB adjudications." (Brief, pp. 11-12.) Calvert opposes the entry of summary judgment against him by, in large measure, explaining his view that the NLRB's findings in the unfair labor practice proceedings were incorrect, and that the "outcome of the case had already been determined." (Response, p. 2.)

[1] All statutory citations are to the United States Bankruptcy Code, 11 U.S.C. § 101 *et seq.*, unless otherwise noted.

The Court disagrees with the NLRB's position that the elements of § 523(a)(6) are the same as those already litigated and decided by the NLRB in its prior adjudications.

A debt "for willful and malicious injury by the debtor to another entity or to the property of another entity" is excepted from discharge pursuant to § 523(a)(6). "Bankruptcy courts in [the Seventh Circuit] have focused on three points: (1) an injury caused by the debtor (2) willfully and (3) maliciously." *First Weber Group, Inc. v. Horsfall*, 738 F.3d 767, 774 (7th Cir. 2013) (citations omitted).

Injury "is understood to mean a 'violation of another's legal right, for which the law provides a remedy.' The injury need not have been suffered directly by the creditor asserting the claim. The creditor's claim must, however, derive from the other's injury." *Id.* (internal citations omitted).

"Willfulness requires 'a deliberate or intentional *injury*, not merely a deliberate or intentional *act* that leads to injury.' " *Id.* (quoting *Kawaauhau v. Geiger*, 523 U.S. 57, 61, 118 S.Ct. 974, 140 L.Ed.2d 90 (1998) (emphasis in original)). " 'Willfulness' can be found either if the 'debtor's motive was to inflict the injury, or the debtor's act was substantially certain to result in injury.' " *Id.* (quotation omitted).

Maliciousness requires the debtor to act "in conscious disregard of one's duties or without just cause or excuse; it does not require ill-will or specific intent to do harm." *In re Thirtyacre*, 36 F.3d 697, 700 (7th Cir. 1994) (quotation omitted). The Seventh Circuit reaffirmed its definition of maliciousness from *Thirtyacre* as good law. *Horsfall*, 738 F.3d at 774-75.

Certainly, the material facts presented in a nondischargeability adversary proceeding and an unfair labor practice proceeding may be similar, but a bankruptcy judge and an administrative law judge evaluate those facts using different legal standards. Relevant to this adversary

proceeding, the Court takes particular note that the level of "*mens rea*" required for a determination of nondischargeability is not the same with respect to an unfair labor practice determination under § 8(a) of the National Labor Relations Act. The Court agrees with the reasoning of *National Labor Relations Board v. Gordon (In re Gordon)*, 303 B.R. 645, 657 (Bankr. D. Colo. 2003) ("Consequently, the fact that liability was assessed against [debtor] does not compel any conclusion with respect to [debtor's] subjective intent in committing those violations.")

As the *Gordon* court acknowledged, the inquiry does not end there. "If the ALJ made specific findings of fact with respect to [debtor's] intent as to the employees themselves, then under the doctrine of collateral estoppel, those findings are binding upon this Court." *Id.*

In the Brief, the NLRB attempts to tie the NLRB's prior adjudications to the intent elements of § 523(a)(6) (Brief, pp. 13-19) and alleges that "the administrative law judge made specific findings regarding Calvert's intent, determining that he purposely discharged his employees to rid himself of a workforce capable of exercising its statutory right to organize a union." (Brief, p. 17.) The NLRB did not specifically cite a portion of the designated materials in support of this summary statement, but elsewhere in the Brief (p. 14) pointed the Court to Ex. A to the Motion at 1219:

> In light of these factors, I conclude that the General Counsel has established a prima facie case that ELC laid off its employees on March 14, 2003, because of their union activities, to wit, to avoid having further NLRB proceedings and the risk that the Union might ultimately be certified as the collective-bargaining representatives of its employees.

The ALJ continued:

> In conclusion, Calvert's testimony on the transition was wholly unreliable and utterly failed to rebut the General Counsel's prima facie case that the layoffs of employees and switch to labor providers was motivated by legitimate business considerations rather than antiunion animus.

> I conclude, accordingly, that the layoffs of ELC employees on March 14, 2003, and their having to work for ELC thereafter through labor providers violated Section 8(a)(3) and (1) [of the National Labor Relations Act].

Id. at 1220.

"Antiunion animus" may violate the National Labor Relations Act, but it may or may not rise to the level of nondischargeability under § 523(a)(6). Having reviewed the decisions issued in the prior NLRB adjudications, the Court does not find a sufficient level of "specific findings" as to Calvert's intent that would enable it to give those decisions preclusive effect as to the issue of liability (nondischargeability). Therefore, the Court denies the Motion with respect thereto. Instead, the Court will analyze whether the facts proven at trial, particularly with respect to the intent of Calvert to harm the subject employees, will support a conclusion of nondischargeability.

Though not separately addressed, the Court further concludes that the claims against Calvert have been liquidated in the NLRB proceedings (with Calvert's and his counsel's participation) and that the Court will give preclusive effect to the amount of the debt. However, the NLRB will have to prove what parts of the debt fall under § 523(a)(6).

§ 727(a)(3) and (4)

Section 727 provides, in relevant part:

> (a) The court shall grant the debtor a discharge, unless –
>
> (3) the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case;
>
> (4) the debtor knowingly and fraudulently, in or in connection with the case –
>
> (A) made a false oath or account;

> (B) presented or used a false claim;
> (C) gave, offered, received, or attempted to obtain money, property, or advantage, or a promise of money, property, or advantage, for acting or forbearing to act; or
> (D) withheld from an officer of the estate entitled to possession under this title, any recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs; … .

The NLRB requests that Calvert be denied a discharge in his bankruptcy case under § 727(a)(3) because "Calvert has failed to maintain and preserve records that are critical to reviewing monetary transactions with his son [Kevin] and determining his overall financial condition" including "the signed promissory notes reflecting the terms and amounts of those loans." (Brief, p. 20.) Calvert claims he "could not find the folder containing the original signed notes" but that he "gave copies of each unsigned note to the NLRB that [Calvert] down loaded from [his] personal computer's hard drive" showing "the date when each document was created, the amount of each note, who the money came from making the loans (Edward and Linda Calvert) and the interest rate applicable to each loan." (Response, p. 10.)

The standard for evaluating a § 727(a)(3) request for denial of discharge includes whether "such act or failure to act was justified under all of the circumstances of the case." (Emphasis added.) Thus, the Court needs evidence of "all of the circumstances of the case" that has not been presented at the summary judgment stage.

With respect to § 727(a)(4), the NLRB alleges that Calvert made false statements concerning his business activities and income to intentionally defraud his estate. (Brief, p. 22.) The NLRB alleges that "Calvert attempted to conceal that he had operated a consulting business and that he had income from that business in the relevant time period prior to filing his bankruptcy petition" and that "he had transferred his income into his wife's bank account" by omitting such information from his schedules, statement of financial affairs and § 341 meeting of

creditors testimony. (Brief, pp. 22-23.) Calvert counters that he does not believe he made false statements in connection with his bankruptcy case; he used his wife's bank account because it was the only account available; and he did not consider what he was doing a "business." (Response, pp. 10-12; 16-17.) While Calvert's arguments do not seem to be internally consistent, the NLRB has fallen short (for purposes of summary judgment) of showing that Calvert "knowingly and fraudulently" made false statements that should preclude his receiving a chapter 7 discharge.

Therefore, the Court denies the Motion with respect to denying Calvert's discharge pursuant to § 727(a)(3) or (4). The Court will analyze whether the facts proven at trial justify a denial of Calvert's discharge.

Conclusion

For the foregoing reasons, the Court denies summary judgment but will give preclusive effect to the amount of the debt as liquidated in the prior NLRB proceedings. The trial set to begin on **September 23, 2015 at 10:00 a.m. EDT** and continue on September 24 and 25, 2015, will proceed as scheduled.

IT IS SO ORDERED.

# # #

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF Southern Indiana

Minute Entry/Order

Hearing Information:

Debtor: EDWARD LEE CALVERT
Case Number: 13-13079-JMC-7A **Chapter:** 7

Date / Time / Room: WEDNESDAY, SEPTEMBER 23, 2015 10:00 AM IP 310

Bankruptcy Judge: JAMES M. CARR
Courtroom Clerk: HEATHER BUTLER
Reporter / ECR: HEATHER BUTLER

Matter:

ADV: 1-15-50001

National Labor Relations Board vs Edward Lee Calvert

Trial

R / M #: 0 / 0

Appearances:

DALFORD DEAN OWENS, ATTORNEY FOR NATIONAL LABOR RELATIONS BOARD
WILLIAM RUSSELL WARWICK, ATTORNEY FOR NATIONAL LABOR RELATIONS BOARD
EDWARD LEE CALVERT, DEFENDANT

Proceedings:

Disposition: Trial held. Court heard and considered testimony of Lisabeth Luther and Edward Calvert. Plaintiff's exhibits 1-13 admitted without objection. Defendant's exhibits K-W admitted without objection. Court to issue a ruling.

IF COUNSEL HAS BEEN DIRECTED BY THE COURT TO SUBMIT AN ORDER BASED ON THE COURT'S RULING OR THE PARTIES' AGREEMENT, THEN NO FURTHER NOTICE OR REMINDER WILL BE ISSUED. THE COURT WILL NOT KEEP A CASE OPEN SOLELY BECAUSE THE ORDER WAS NOT SUBMITTED WITHIN THE TIME PERIOD DIRECTED BY THE COURT. IN SUCH INSTANCE, A REOPENING FEE WILL APPLY.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF INDIANA

In Re:	Case No. 13-13079-JMC-7A
EDWARD LEE CALVERT,	
Debtor.	
NATIONAL LABOR RELATIONS BOARD,	Adversary Case No. 15-50001-JMC
Plaintiff,	
v.	116 U.S. Courthouse 46 East Ohio Street
EDWARD LEE CALVERT,	Indianapolis, IN 46204
Defendant.	
	September 23, 2015
	10:00 a.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE HONORABLE JAMES M. CARR
UNITED STATES BANKRUPTCY COURT JUDGE

APPEARANCES:

For Debtor:	EDWARD LEE CALVERT, PRO SE 1406 Harmony Trail Greenfield, IN 46140
For the National Labor Relations Board:	National Labor Relations Board By: DALFORD DEAN OWENS, JR., ESQ. WILLIAM RUSSELL WARWICK, III, ESQ. 1099 14th Street Northwest, Suite 10700 Washington, D.C. 20005
Audio Operator:	Heather Butler

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I N D E X

(Call to Order of the Court)

THE COURT: Please be seated. Good morning.

MR. OWENS: Good morning.

MR. MASCIOLI: Good morning.

THE COURT: Do we not have the graph? All right. We're here on the adversary proceeding number 1-15-50001, which is National Labor Relations Board v. Edward Lee Calvert. We're here on the trial of that action. Appearing for the Plaintiff NLRB would be Mr. Warwick --

MR. WARWICK: Yes, sir.

THE COURT: -- William Warwick and Mr. Owens.

MR. OWENS: Good morning.

THE COURT: And representing himself is Mr. Calvert.

MR. CALVERT: Yes, sir.

THE COURT: Good morning to you all. All right. Before we start, let me make sure that I tell you where I think we are, because there seems to be some confusion. I know that Mr. Calvert indicated that, in his trial brief, he wanted to call as a witness the administrative law judge in this NLRB action and presumably wanted us to compel his attendance. And I overruled that and that's because the action, the NLRB action, determined that Mr. Calvert was responsible for violation of the National Labor Relations Act.

I am not going to relitigate that. You understand that, Mr. Calvert? But that is not the issue that's before the

Court or among the issues that are before the Court. The issue before the Court is whether you violated Section 523(a)(6) of the bankruptcy code, which requires the Plaintiff to demonstrate that their claim is based upon your willful and malicious injury to the employees who they in effect represent. So willful and malicious injury to those employees or the property of those employees is the issue at hand.

I do not believe and do not read the administrative law judge's decision to find that Mr. Calvert's violation of the National Labor Relations Act was done with any sort of intent. There was no finding of intent, or mindset, or mens rea, if you will, whereas the adjudication by the administrative law judge, which has been affirmed by the Seventh Circuit, does establish a violation of the National Labor Relations Act.

It does not in any way establish any sort of intention of the kind that is required to find that he's guilty of willful and malicious conduct that's caused injury. So we're not going to relitigate whether or not you violated the National Labor Relations Act -- that's been established -- or whether you're responsible for a violation of the National Labor Relations Act. And then, of course, the other issues have to do with the NLRB's contention that you violated Sections 727(a)(3) and (4), which have to do with either concealing, destroying, mutilating, falsifying, or failing to

keep or preserve recorded information, including books, documents, records, and papers in which the Debtor's financial condition or business transactions might be ascertained unless the failure was justified under the circumstances of the case.

So that's one thing. And then I think that largely has to do with the promissory note or other documentation with regard to loans or advances you made to your son. And then the second charge is that you knowingly and fraudulently, in connection with the case, made a false oath or account, which as I understand it has to do largely with testimony that you gave at the 341 meeting at an examination in the bankruptcy code and largely concerns business transactions that you may have had before the bankruptcy case was filed and some transactions you may have had with your wife.

Is that what we're talking about? So I just want to make sure, particularly because Mr. Calvert is proceeding pro se, which is difficult, obviously, in a case of this sort. Those are the issues we're talking about. All right. So having said that, if either or both of you want to make an opening statement, you can. I've read your trial briefs. We had the summary judgment, which was thoroughly briefed.

I have a pretty good handle on what we're talking about here. There's no jury, so I have to tell you, I think we're going to not make good use of our time if we spend it replotting that ground. What I'd really prefer is that we

proceed right with the presentation of evidence. Is that acceptable?

MR. WARWICK: That's fine with me, Your Honor.

THE COURT: All right. Great. And then NLRB, why don't you call your first witness?

MR. WARWICK: All right. Your Honor, I'd like to call Lizabeth Luther to the stand.

THE COURT: All right. Ms. Luther, will you raise your right hand?

LIZABETH LUTHER, NLRB'S WITNESS, SWORN

THE COURT: All right. Please have a seat over here.

MR. WARWICK: Your Honor, if I could just clarify a couple procedural questions for the Court --

THE COURT: Sure. Go ahead.

MR. WARWICK: How would Your Honor prefer? Do I move around? Do I stand --

THE COURT: You can do whatever you want.

MR. WARWICK: Okay.

THE COURT: You're not going to offend me. I have practiced law a long time and you can do whatever you want --

MR. WARWICK: Okay. Wonderful.

THE COURT: -- as long as, you know, you don't interfere with Mr. Calvert's vision of the witness or my vision of the witness. Do anything you like.

MR. WARWICK: Of course. And we prepared binders

pre-tabbed to be marked for the exhibits, two of which I'll use.

THE COURT: I'd like to see that. And Mr. Calvert, have you looked at those?

MR. CALVERT: Yes, sir.

THE COURT: All right.

MR. CALVERT: I have --

THE COURT: Yeah. Is there any contention regarding the admissibility of the documents?

MR. WARWICK: We of course do not believe so.

THE COURT: Mr. Calvert, do you have any -- okay. Then why don't you hand those to me and offer them? And let's just get them out of the way and get them admitted.

MR. CALVERT: Handing mine up also, Your Honor.

THE COURT: Well, let's start with theirs. They're presenting their case first.

MR. WARWICK: I have a binder copy for you, Mr. Calvert. Of course, Ms. Luther, I have one for you.

THE WITNESS: Thank you.

MR. WARWICK: Your Honor, I've got one for you to follow along if you would like to.

THE COURT: Yeah. I would love to. But I have to say -- let me stop for a second, just because of --

MR. WARWICK: Sure.

THE COURT: -- something that Mr. Calvert just said.

I want to make sure he's not a lawyer. Right? Mr. Calvert, you're not a lawyer.

MR. CALVERT: That's correct.

THE COURT: All right. So what we're going to do here is, the NLRB has the burden of proving the elements of their claim. They're going to begin by presenting their evidence. They're going to present all of their evidence. They're going to present their evidence by way of witnesses and documents. The witnesses they present, starting with Ms. Luther -- they're going to examine that witness. I mean they're going to ask questions of that witness.

You have the opportunity to object if you believe there's a legal objection for the question. That doesn't mean you disagree with what they're saying, but if you think there's some legal basis to object to the questioning, you may object. If you object, then I'll take up the objection. When they're all through presenting their evidence, then it'll be your opportunity to present your evidence.

And as I've said -- I'm thinking maybe I left this out -- when they examine their witnesses, asking questions of their witnesses, when they're through asking questions of that witness, you have the opportunity to cross-examine, which means you have the opportunity to ask questions of that witness yourself. They will in turn have the opportunity to ask redirect questions based on the questions and answers, the

questions you asked of the witness and the answers that were given.

The Court can ask questions of the witness if there are gaps or things that the Court is interested in. When they're all through presenting their evidence and you're all through presenting your evidence, then I'll have to decide the case. Whether I can decide the case at the conclusion of the trial or I'm going to have to take it under advisement and think about what I've heard is yet to be seen, but that's how we're going to proceed. Do you understand?

MR. CALVERT: Yes.

THE COURT: All right.

MR. WARWICK: Your Honor, I've got one extra copy if your clerk or officer would like to follow along as well.

THE COURT: Well, who has the marked versions?

MR. WARWICK: I will. I'm going to give the official versions right now --

THE COURT: All right.

MR. WARWICK: -- the ones that are originally marked.

THE COURT: All right. So the National Labor Relations Board has offered in binder fashion Exhibits 1 through 10, marked. Well, actually, they're actually marked --

MR. WARWICK: 1 through 13, Your Honor.

THE COURT: -- 1 through 13. And Mr. Calvert, you've indicated you had no objection to the admissibility of these.

That doesn't mean you agree with them, but that you have no objection to their admission into evidence.

MR. CALVERT: No, sir, not now.

THE COURT: Then the Court will admit without objection NLRB Exhibits marked 1 through 13.

(Exhibits 1 through 13 admitted.)

MR. WARWICK: And here are the original versions for the record, Your Honor.

THE COURT: Okay. All right. Proceed.

DIRECT EXAMINATION

BY MR. WARWICK:

Q Good morning.

A Good morning.

Q Could you please state your name for the record?

A Lizabeth Luther.

Q Good morning, Ms. Luther. By whom are you employed?

A The National Labor Relations Board.

Q And what is your job at the National Labor Relations Board?

A I'm the compliance officer for Region 25, subregion 33, which means I'm officed in Indianapolis, Indiana.

Q And how long have you been a compliance officer with the National Labor Relations Board?

A Since June 2004.

Q And how long have you been with the NLRB in total?

A Since September 2000.
Q Could you describe to the Court your duties as compliance officer?
A My duties fall under two broad categories. First, I am responsible for effecting compliance with settlement agreements, board orders, and court judgments which arise from cases prosecuted, unfair labor practices, charged cases prosecuted by the regional office. And then secondly, I'm responsible for reviewing financial and payroll records, for computing, collecting, and dispersing of back pay pursuant to those settlement agreements, orders, and court judgments.
Q Are you familiar with any board cases involving a company called ELC Electric?
A Yes. I am.
Q How so?
A I became involved with the ELC cases in 2005, when the board order issued and the cases became compliance cases at that time.
Q Do you recall a board hearing around 2012 regarding compliance issues in the ELC Electric case?
A I do.
Q What was your specific involvement with that?
A I assisted in trial prep. I updated the computations for that. I updated or amended the compliance specification and actually, during the trial, had an opportunity to meet with Mr.

Calvert. And during our discussion, we agreed on a stipulated amount of back pay that was owed. And Mr. Calvert entered into that stipulation.

Q With respect to back pay, do you recall what the Court ordered in that case?

A They ordered that Mr. Calvert pay back pay to 16 different individuals and that the point of the board order was -- I've lost the amount right now. I'm sorry.

Q Will you please take a look at Exhibit number 4, that binder I handed up?

A Certainly.

Q Is that the 2012 court order regarding the compliance hearing we're talking about?

A Yes. It is.

Q And after reviewing that order, can you recall how much the board ordered Mr. Calvert to pay in back pay (indiscernible)?

A They ordered him to pay $437,427 in back pay to --

Q And does it describe specifically how much is owed to each individual in that case?

A It does.

Q Describe, if any, current duties you have regarding ELC Electric's compliance.

A Okay. I am responsible for periodically updating the back pay calculation and the interest calculation.

THE COURT: Can I stop you for a second? So this order that we're talking about was entered on November 8, 2012. Is that correct?

THE WITNESS: Yes.

THE COURT: Go ahead. I'm sorry.

BY MR. WARWICK:

Q Continue, Ms. Luther. I'm sorry. I was checking the binder for myself.

A I'm sorry. I update the interest calculation as well on the amount of back pay owed and, if there have been any payments received, I include that in the calculation.

Q And have there been any payments received since that court order?

A Yes. There have. There have been two. And they were received pursuant to a protective order, protective restraining order. One of them was in the amount of $1,902, received from one of Mr. Calvert's bank accounts. And the other was in the amount of $21,979, received from a company called MERC, which is an alter ego of ELC. And I'm aware of these because I have recently updated the calculations again. So --

Q And did you reduce the amount Mr. Calvert is owed? Or I'm sorry. Let me rephrase that question. Did you reduce the amount Mr. Calvert owed by the amount of money that was collected pursuant to the protective order?

A Yes. I did.

Q Have there been any other factors affecting how much Mr. Calvert owes?

A Well, the amount, as is true with all of these back pay cases, of interest continues to accrue until such time as compliance with the board order is achieved. So whenever I am calculating the interest, it's going to continue accruing.

Q And when was the -- you may have testified to this earlier, but when was the last time you updated these, the back pay calculation?

A Last week, I updated in anticipation of the hearing.

Q Okay. How do you document the ongoing addition of interest and how much is owed by Mr. Calvert?

A I create an Excel spreadsheet and, on that spreadsheet, I reflect the amount owed each individual in back pay and interest and as a total. And then I also reflect the total amount owed as of the particular date.

Q Ms. Luther, could you turn to what's been pre-marked as Plaintiff's Exhibit 13? It's the very last one in that binder. Do you recognize this document?

A I do.

Q Can you tell the Court what it is?

A It is the spreadsheet that I created last week, in which I updated the interest through today's date. I know that it's my spreadsheet in that, at the top of the page, I've reflected the case name of ELC Electric, Incorporated and the case number.

It's the lead case number in this matter. I've also reflected beneath that, that the interest is through today's date. And then there are a series of columns, left to right. There are four columns.

Each discriminatee is named in the leftmost column. The amount of back pay owed each individual is reflected in the column to the right of their name. The interest is reflected in the column to the right of the back pay amount for each individual. And the total owed each individual is reflected in the rightmost column.

And then along the bottom of each column, I have indicated the total amount owed, so the total amount of back pay is $21,065, which reflects the decrease from the amounts that were obtained pursuant to the protective order. The interest is $167,184, which is accurate through today. And the total owed now is $458,249. That's back pay and interest. There will also be an addition of excess tax to account for the liability that these individuals will incur by receiving the back pay and interest in a lump sum.

THE COURT: I think -- Ms. Luther, I think you misspoke when you reported what you read on the second column --

THE WITNESS: I'm sorry.

THE COURT: -- with regard to back pay. Would you restate what you said the back pay numbers --

THE WITNESS: For the total?
THE COURT: Yes.
THE WITNESS: 167,184.
THE COURT: Now, that's the interest. Right?
THE WITNESS: That's the interest. You said back pay?
THE COURT: Yes. I think --
THE WITNESS: $291,065.
THE COURT: Thank you.
MR. WARWICK: And just to be clear for the Court, those two things added together is how you get to that.
THE COURT: I understand. I think she said $25,000 the first time she --
MR. WARWICK: Yeah.
THE WITNESS: I'm sorry.
THE COURT: -- testified and I think it was -- I recognized that she's just misspeaking, I think.
MR. WARWICK: Yeah. That would be a significant different number.
THE WITNESS: Yes, definitely.
BY MR. WARWICK:
Q Okay. Ms. Luther, one last question -- what is the purpose of a back pay remedy under the National Labor Relations Act?
A The back pay remedy is virtually one of the only remedies

we have. It may be virtually the only remedy for statutory violations of the National Labor Relations Act.

Q So would it be fair to say that, when an individual's rights are violated under the act, this is the remedy the act provides for?

A That is correct. It is statutorily provided.

MR. WARWICK: Okay. Thank you, Ms. Luther. No more questions.

THE COURT: Cross-examination, Mr. Calvert?

MR. CALVERT: If it's okay, I'll sit, Your Honor, if that's okay.

THE COURT: Sure, absolutely, no problem.

MR. CALVERT: I'm not as young as these attorneys.

THE COURT: No. I understand. Neither am I.

MR. CALVERT: My knees hurt a little bit.

THE COURT: Yeah, me, too. No, you can sit down and question the witness if you like.

MR. CALVERT: Thank you, sir.

CROSS-EXAMINATION

BY MR. CALVERT:

Q It's nice to see you again and I do --

A Good morning.

Q -- remember that meeting. And I think, at that meeting, also, Mr. Tom Blankenship was standing in the corridor with me when he -- I was with my attorney at that time. And I believe

that -- correct me if I'm wrong, but our conversation went some way like that these were three or four people, that you needed some sort of computation, and if you didn't have that, the hearing couldn't move forward or especially on those three or four people. And you asked if I would go ahead and stipulate to whatever that back pay was. I think it was interest or something. And I said, yes, I would. Is that pretty much our conversation?

A I don't recall it in quite that way. I recall having a discussion with you about the nature of the hearing that we were involved in, and that a component of it was over the back pay amount that was owed, and that, if there was a stipulation to the back pay amount, that, that would not be a matter then tried in that proceeding.

Q Well, was --

A And we agreed on this dollar figure.

Q Was it everybody involved?

A I'm sorry?

Q Was all the people on this list involved in our conversation or was this just the people?

A The dollar figure reflected everybody, all 16 discriminatees.

Q Okay. Mr. Blankenship was there. Right, in this conversation?

A I believe that he may have been in the hall with us.

Q Okay. Okay. You've testified that you use all these computations and different things to arrive at these back pays. What documents did you use?

A Could you explain?

Q Yeah. In other words, what documents did you review and use to come up with this assortment of --

A From my interest calculation?

Q -- how much I owe each person?

A From my interest calculation?

Q No, from a regular -- you're a compliance officer. You came up with, I owe Mr. Sanderson X amount of dollars and then the interest was on top of that. Did you make those computations as to how much I owe --

A Yes. I did.

Q -- each one? What documents did you use to make those?

MR. WARWICK: Your Honor, I'd like to object. I mean, his back pay liability's already been litigated and determined as part of --

THE COURT: Well, no. I'm going to overrule. This is cross-examination. You introduced the exhibit showing these numbers. It's fair for him to ask what documents she reviewed to arrive at the numbers.

THE WITNESS: Okay. I would have reviewed a variety of records. I try to get records from as many sources as possible. So I would have used payroll records from the

individual discriminatees.

BY MR. CALVERT:

Q I can't hear you. I'm sorry.

A I'm sorry. And there's noise outside the window. There's, like, a jackhammer going. I would have used payroll records from the discriminatees, so I would have asked for their check stubs. I would have used records from the Indiana Department of Workforce Development, which --

Q And I'm sorry. (indiscernible) because I don't understand what they are. Workforce Development -- what documents?

A I was going to explain that.

Q I'm sorry. I'm sorry. I didn't mean to interrupt.

A Okay. Indiana Workforce Development -- employers pay in to Indiana Workforce Development and they have to report the amount of money paid to each employee every quarter. And so I can request those records from the State of Indiana, Workforce Development. And that will show me the earnings of the individuals while they were employed by the employer.

If I do not have comparable employees to compare who are ongoing employees once the discriminatees have been laid off, then I can extrapolate from what those individuals were earning at the time -- usually a year before they were laid off, and, through the Indiana Workforce Development records, I can see what their earnings were. I can extrapolate from those records to determine what they would have been making.

Q I don't understand extrapolate, unless you're meaning, you look back at what they made last year and thought that's what they was going to make this year.
A We can do that, yes.
Q Okay.
A That's one of the approved methods under statute.
Q So that's one of your calculations, that it's more of a guess now.
A I use every record I can get my hands on. I ask for records from the employer. If the employer provides payroll records, I use the employer's payroll records. If the employer provides records for individuals who continued their employment, I will use those and see if they are similarly situated to the employees who were laid off. So there are a number of methods that can be used. I generally employ all of those methods available to me when I'm computing back pay to get the most accurate figure possible.
Q What employers did you ask for records of each of the individuals employed --
A These individuals worked for ELC.
Q But the back pay is not what they were making at ELC. The back pay, if I understand this right, is, since they were laid off on a certain date, then all the time that they were laid off, when they wasn't even working for ELC, I therefore, for some reason, owe them back pay. So I'm asking you --

THE COURT: Yeah. Mr. Calvert, we're starting to drift. As I said in the beginning, we're not going to relitigate --

MR. CALVERT: Right.

THE COURT: -- whether or not you're responsible for these amounts as a violation of the National Labor Relations Act. That's already been determined and the amounts have already been determined. So we're really drifting back into that issue and --

MR. CALVERT: Okay.

THE COURT: -- we shouldn't be.

MR. CALVERT: I understand, Your Honor.

THE COURT: So really, all the -- in my mind, the only thing that's significant about Exhibit 13 is that it reflects an update from the order that was entered on November 8, 2012.

MR. CALVERT: Okay.

THE COURT: So that really ought to be all we're covering.

MR. CALVERT: Okay. Thank you. It doesn't make any difference, Your Honor, whether these people used to work or not --

THE COURT: No.

MR. CALVERT: We've got to --

THE COURT: No.

MR. CALVERT: I understand. That's all I have. This was --

THE COURT: All right. Any redirect, please?

MR. WARWICK: No redirect, Your Honor.

THE COURT: All right. Then please step down.

THE WITNESS: Thank you.

THE COURT: Next witness?

MR. WARWICK: You can go ahead and I'll take the binder right now, since there's no reason to (indiscernible). So thank you. Your Honor, the Court (sic) would like to call the Defendant, Mr. Edward Calvert, to the stand.

THE COURT: The NLRB would like to call, not the Court would like to call.

MR. WARWICK: I'm sorry. I would like to ask the Court.

THE COURT: Yeah, that's fine.

MR. WARWICK: I apologize.

THE COURT: Mr. Calvert, please raise your right hand.

EDWARD LEE CALVERT, DEBTOR, SWORN

THE COURT: All right. Mr. Calvert, please take the witness stand.

DIRECT EXAMINATION

BY MR. WARWICK:

Q Good morning, Mr. Calvert.

A Good morning.
Q My name is William Warwick and me along with my co-counsel, Dean Owens, represent the National Labor Relations Board in this adversary proceeding. Mr. Calvert, you were the Debtor in this case. Correct?
A The Debtor, yes.
Q And you filed a personal bankruptcy under Chapter 7 of the bankruptcy code?
A That's correct.
Q And do you understand why you are here today?
A I think the judge pretty much said that. The NLRB filed charges against me, claiming that I did something wrong in this case.
Q And you understand that this hearing is take evidence to resolve the NLRB's allegations under 523(a)(6), 727(a)(3), 727(a)(4) of the bankruptcy code?
A You say it's to take evidence?
Q It's for the Court to receive evidence regarding the NLRB's allegation.
A Yes, sir.
MR. WARWICK: Your Honor, I'd like to request permission to question the Defendant in this case pursuant to Federal Rule of Evidence 611(c).
THE COURT: That's fine. Go right ahead. Mr. Calvert, that means that you are in effect a hostile witness,

meaning you're on the other side and he can examine you, asking leading questions, and he couldn't do that with respect to his own witnesses. But it's not, you know -- you're under the same obligation to testify truthfully.

THE WITNESS: Okay.

THE COURT: Thank you.

BY MR. WARWICK:

Q Mr. Calvert, are you familiar with a business called ELC Electric?

A Yes.

Q And you were the president and sole owner of that business?

A Yes, sir.

Q And you operated that business in and around Indianapolis, Indiana?

A Yes, sir.

Q And you operated the company until approximately 2006?

A Yes, sir.

Q And you are aware that, in June 2003, the NLRB issued an unfair labor practice complaint against ELC Electric?

A Yes, sir.

Q And there was a hearing on that complaint in August and in November of 2003?

A Yes, sir.

Q And you personally appeared at that hearing.

A Yes, sir.
Q And you were represented by counsel at that hearing?
A Yes, sir.
Q And you're aware that the ALJ decision and the ALJ's order issued on April 7th, 2004?
A Yes, sir.
Q And you filed an objection to the two, Judge Sanders's (phonetic) decision. Correct?
A Correct.
Q And the Board upheld Judge Sanders's decision. You previously stipulated in the case ELC Electric, Incorporated, 344NLRB1200, in 2005? I know there was a lot in that. I'm sorry.
A That's correct to the best of my ability and memory.
Q Okay. Well, actually, you can flip in your binder to Exhibit number 2 and tell me if you recognize that decision.
A Yes. I recognize that. Yes.
Q And in that decision, the Board found that ELC Electric had engaged in the unfair labor practice that included the lay-off of 16 employees?
A Yes.
Q And that specifically included the lay-off of 13 employees on March 14, 2003.
A Yes.
Q And the Board, in that order, told ELC Electric that they

had to make those employees whole?

A Yes.

Q And following that decision, the National Labor Relations Board issued what we call compliance specification and a notice of hearing that was to calculate what back pay ELC Electric was going to be liable for?

A Was that the second hearing, that Judge Sanders provided?

Q I do believe so, yes.

A Yes.

Q In September 2006, the National Labor Relations Board issued a supplemental order concerning the calculation of that back pay and ELC Electric, Incorporated 348 -- you know what? It's Exhibit 3 in your binder. It might just be easier to do that rather than read it all into the record. Do you recognize that to be the supplemental decision?

A I recognize the pages, yeah.

Q And that order also remanded a portion of the case back to the ALJ again. Right?

A I'm not certain.

Q Are you aware that, in April 2011 -- so this would have been almost five years later -- the National Labor Relations Board issued an amended compliance specification and notice of hearing?

A I'm not sure as to the dates. I mean, I've looked at thousands of pieces of paper.

Q Do you recall being present for a hearing --
A Yes.
Q -- in 2011?
A Yes.
Q Okay. And you testified at that hearing.
A Yes.
Q And you were represented by counsel at that hearing.
A Yes.
Q And after that hearing, on December 20, 2011, Judge Sanders issued a supplemental decision?
A Yes.
Q And you took exceptions to that decision.
A Yes.
Q And in November 2012, the Board issued a supplemental order, which has an even longer name. It's Exhibit 4. Do you recognize that supplemental order that was issued in 2012?
A Parts of it, yes.
Q And in that decision, that's the decision where the Board ordered you to personally make employees whole by paying approximately $437,000?
A Yes.
Q And you're aware that a Seventh Circuit judgment entered, enforcing that, NLRB's order, on July 20, 2013?
A Yes.
MR. WARWICK: It's Exhibit 5 if you -- just for the

Court's notice.

THE COURT: Okay.

BY MR. WARWICK:

Q All right. Mr. Calvert, I'm going to go back in time a little bit from where we're at. Do you recall that NLRB conducted an election among ELC's employees on August 26th, 2002?

A Yes.

Q And that election was to determine if your rank-and-file employees wanted to be represented by the International Brotherhood of Electrical Workers?

A Yes.

Q And you became aware that some of your employees were trying to organize a union workplace before that election. Right?

A Correct.

Q And at the time of the election, in August, you're aware that federal law gave your employees the right to try and organize a union in your workplace?

A Yes.

Q And would you agree that there was a proposed bargaining unit of employees that were eligible to vote in that election, but not all of your employees were eligible to vote?

A There was a bargaining unit that I believe was established by the court or something, NLRB, whomever, that said, yeah,

these people are the ones that can vote in that election, yes.
Q You understood that, for instance, supervisors couldn't vote --
A Exactly.
Q -- or that temporary employees couldn't vote.
A Exactly.
Q And your supervisors didn't vote in that election. Right?
A That's correct.
Q Because they didn't have the right to?
A Yeah. You just said so, yes.
Q All right. And the same goes for your temporary employees. They did not vote, either --
A No, not to my knowledge.
Q -- because they had no right to vote under the law. Right? Prior to the union election in 2002, you had from time to time used some labor for ELC Electric projects that were provided by a third-party labor provider?
A Could you repeat --
Q I'm sorry. That was a very convoluted question. Let me rephrase. Prior to 2002, prior to the election, had ELC Electric used temporary employees?
A I'm sure we had at one time or another.
Q But do you recall specifically using them before 2002?
A I don't recall any specific dates, but I'm sure we did.
Q Okay. Mr. Calvert, is it true that you campaigned against

the union for a period of time preceding the election in your workplace?

A Yes. I understood that was my right.

Q And it was because you wanted ELC Electric to remain union free. Right?

A That's correct.

Q in the months preceding the election, you sent several letters to employees that discussed the impending election?

A That's correct.

Q And you explained your position about why you didn't feel that a union was a good fit for your company?

A That's correct.

Q If you could, go ahead and turn to Exhibit number 6, just because it's there, is this one of the letters that you sent out to employees?

A Yes. I believe it is.

Q And that's your signature at the bottom of, it looks like, page three and then again at page five?

A Yes.

Q And in that letter, you explained to them that ELC already offers good benefits and good vacation pay.

A I haven't read this all the way through, but yes. ELC did offer that.

Q Okay. Well, can you take a look at the letter real quick under just the first -- if you want to, read just the first two

paragraphs.

THE COURT: Counsel, you're acting as though Exhibit 6 is one letter, but it appears to be more than one letter, is it not?

MR. WARWICK: You're right, Your Honor. I apologize. It is two letters.

THE COURT: There appears to be a letter dated September 23, 2002 and there also seems to be a letter dated September 6th, 2002. Is that --

MR. WARWICK: That is correct.

THE COURT: So this is a group exhibit.

MR. WARWICK: I'll clean that up with Mr. Calvert.

THE COURT: All right.

BY MR. WARWICK:

Q Mr. Calvert, do you recognize both of these letters?

A Yes.

Q Okay. And these are both of -- these both are letters that you sent out, explaining why you wanted your workplace to remain union-free.

A Yes.

Q And that is your signature at the bottom, at the end of both letters.

A Yes.

Q All right. And in these letters, you explain that you offered good benefits to your employees --

A Yes.
Q -- and that, if you get a union, you can't guarantee that the same benefits will be offered.
A If I had said that, which I don't believe I said that, but although that could be the truth because, if a union would come in there, then it's my understanding that I would have to negotiate with them on the wages and benefits. And the benefits might not be as good as what they were receiving.
Q Okay. Thank you, Mr. Calvert. I want to move ahead now to the spring of 2003 and I'm going to ask you some questions about the lay-off of employees. And I want to be clear, I'm not asking you why you did it. I just want to get some facts into the record about what happened.
A Okay.
Q So on or around March 14, 2003, you laid off 13 employees. Right?
A That's correct.
Q And would you agree that, when you laid these employees off, your working relationship with them changed?
A When I laid them off, my working relationship with them changed?
Q For --
A Yeah, they wasn't working for me anymore.
Q All right. Right. So they were no longer employees of ELC.

A No.
Q You no longer were obligated to pay them. Right?
A Correct.
Q So prior to laying off these 13 employees, more than just pay, they enjoyed other benefits that ELC Electric offered. Correct? For instance, ELC offered these employees health insurance before they were laid off?
A Yes.
Q And it offered vacation time?
A Yes.
Q And it offered paid holidays?
A Yes.
Q And it offered a matching 401(k)?
A I believe it wasn't matching at that time. I'm not sure. We changed that at one period of time.
Q But there was some sort of retirement plan.
A Yes.
Q And at the -- just to be clear, I know it seems like I'm beating a dead horse, but when you laid them off, you no longer offered them these benefits. Right?
A No. They were not employees of ELC.
Q Now, there were two rank-and-file employees that were not laid off in March 2003. Right?
A I'm not sure who you mean.
Q Did you promote anybody to supervisor after you laid off

13 employees?
A There were some employees, and I don't really remember who or how many, that, as I stated in my letter, the letter that I sent out to all the employees prior to the lay-off, some employees would go into management.
Q Okay. So after March 13th, 2003, you had employees and management. And then you laid off 13 employees, who went to temporary agencies, but you don't --
A After March, I'm not sure about the date. You're confusing me on the dates.
Q I'm sorry. So in the spring of 2003 -- let's just be more general -- you promoted a couple people into management, you just said. Right?
A It's whenever I got ready to lay off the employees. Then we took, I don't know how many or I can't remember who at this time, some employees and put them into management spots. And my letter to the employees said that to each employee.
Q So after these letters and after you performed the lay-offs and the promotions, there were no more rank-and-file employees of ELC Electric. Right?
A Not that I can remember.
Q So because there were no more rank-and-file employees, there could be no employees to join a bargaining unit for a union. Right?
A Well, at that stage, probably not.

Q Do you recall that, earlier in 2003, you had laid off three employees named Bruce Sanderson, Jonathan Trinosky, and Mikalis Grunde?

A I believe I've seen paperwork to that effect, that I did lay them off. I don't know the reasons.

Q And you had a project manager named Mike Swally (phonetic)?

A Yes.

Q And you communicated with him about employment decisions?

A Yes. I did.

Q So after you laid off those three employees in early 2003, and after you laid off the 13 employees later that spring in 2003, and after you promoted employees into management positions, you no longer had any employees that could organize a union in your workplace. Right?

A Yeah. I have to say that's correct.

Q So at the time you laid all these employees off, you thought there would not -- there would no longer be a union election.

A I didn't have that in my mind.

THE COURT: Say that again, sir. What did you just say?

THE WITNESS: I said I did not have that in my mind.

THE COURT: Did not have that in your mind.

THE WITNESS: No.

BY MR. WARWICK:

Q Mr. Calvert, that actually didn't answer my question. My question was not what your mindset was. It was, at the time that you eliminate all of these bargaining unit employees, there was not a possibility there could be a union election --

A I'd say probably no.

Q -- because that was your belief.

A It wasn't my belief.

Q I know you're not -- no. Well --

A Are you asking me for my belief?

Q Yeah.

A I didn't say that was my belief. I just said I didn't lay them off for that reason. You're trying to get my belief to say that that's why I laid the people off, because so I wouldn't have a union. That was not my intent.

Q But you did transfer 13 employees to temporary --

A No, sir. I did not transfer them.

Q But you laid them off.

A I laid them off.

Q And you promoted the employees you retained to supervisor.

A Whatever the record says, I don't remember at this time exactly who even I promoted or why they were promoted. But it was probably a combination of my thoughts, Kevin Passman's thoughts of who to keep and who not to keep.

Q Okay.

THE COURT: Kevin Passman -- how do we spell that name?

THE WITNESS: P-A-S-S-M-A-N.

THE COURT: P-A-S-S --

THE WITNESS: -S-S-M-A-N.

THE COURT: -- M-A -- Passman?

THE WITNESS: Yeah. He was the vice president of ELC Electric, that had been --

THE COURT: All right.

THE WITNESS: -- with me some 20-some years.

THE COURT: All right.

BY MR. WARWICK:

Q So you didn't believe there would be a union election going forward, not that, that was your motivation. Now, please, to be clear, you did not believe there would be a union going forward.

A I didn't know.

Q But you knew you had no bargaining unit employees.

A Some time, I may have hired somebody else.

Q But at that time, you had no bargaining unit employees.

A At that time, when I laid everybody off, I did not have anyone that would fit the description of a bargaining employee.

Q Okay. Thank you, Mr. Calvert. Now, I'm going to change directions pretty drastically here and we're going to be done with all that. And we're just going to talk about what's been

going forward with the bankruptcy and the things that you've been deposed about over the last three or four years. Okay? Now, Mr. Calvert, on December 19th, 2013, you filed your Chapter 7 bankruptcy petition seeking a discharge of your debts. Correct?

A Correct.

Q And also on that date, you filed your schedules A through J and a statement of financial affairs along with your petition. Right?

A That's correct.

Q If you want to go ahead and flip to Exhibit 1, we'll be referencing it throughout. And just make sure you recognize that as being your bankruptcy petition.

A That's correct.

Q Do you recall participating in a meeting of creditors that took place in January of 2014?

A Are you talking about with Trustee Petr?

Q Yes.

A That's correct.

Q And you gave testimony at that proceeding. Right?

A Yes.

Q And do you recall that Trustee Petr asked you questions about your petition and your Chapter 7 schedules? I'm sorry, your petition, your schedules, and your statement of financial affairs?

A He asked me several questions.
Q Well, you recall that it was regarding your bankruptcy.
A Yes.
Q And you swore that your answers were true and accurate.
A To the best of my ability.
Q So that's a yes?
A To the best of my ability and knowledge, that's a yes.
Q Okay. Mr. Calvert, let's look at schedule B.
A What page would that be?
Q Page eight of 57 if you look at the top of the header there, top right-hand corner, you see where it says PG one of and then 57? Schedule B --
A Yes.
Q -- is on page eight. Okay. Now, if you actually flip to the end of your schedule B, which is on page 12 -- no. You know what? Strike that. Let's just look straight at schedule B here.
A Okay.
Q Do you recognize everything on this page?
A Yes.
Q Okay. Now, let's turn to page 12, the bottom right-hand corner where it says total.
A Yes.
Q The total value of your personal property, type of filing, is $300,247.26.

A If that's what Mr. Tucker added it up to be, yes.
Q But you reviewed these schedules personally before they were filed. Right?
A Did I review and read every line of 57 documents?
Q Were you familiar with the schedules that Mr. Tucker filed?
A Somewhat.
Q All right. Now, let's look at item 16 on page 10. It says accounts receivable and we're still talking about your personal property.
A Okay.
Q It says $274,000 in personal property. It says accounts receivable for loans you made to your son, Kevin. Right?
A Yes.
Q So would it be fair to say that a very large portion of your personal property is actually accounts receivable for loans you made to your son?
A Yes.
Q During what time period did you make these loans that totaled up to $274,000?
A Well, my son was without a job somewhere in or around 2006, so I think I began loaning him money, me and my wife, in 2006 through 2010 or '11.
Q Do you recall how many different loans there were?
A I don't recall. There's several.

Q Would you agree that, between 2008 and 2010, you made over 70 individual loans to Kevin that totaled over $548,000?
A If that's what the promissory note said, yes.
Q Well, actually, let's look at Exhibit 10.
A Okay.
Q Now, that's not a promissory note, but do you recognize that document?
A Yes. It's a report from my personal computer.
Q And you provided that to the National Labor Relations Board pursuant to subpoena. Right?
A Yes.
Q And the total on the second page is $548,000 and some change.
A Yes, but it also included -- in this list, you'll see the figures $920, $1,840. All of those were paid to my son for health insurance that he provided to me and my wife.
Q So these were all individual loans or some of these were payments back to you? Can you explain this list to me?
A Well, as I said, the checks that I had wrote, for instance, check 195 for $920, that I wrote on 6/12 of 2008, was written to my son for health insurance that he paid for my wife and myself.
Q So you wouldn't characterize that as a loan because it's payments --
A No. It wasn't a loan.

Q Okay.
A It was money that I paid to my son for health insurance that he provided for my wife and I. It was not a loan, no.
Q But a majority of these on the page are loans?
A Yes.
Q Do all of these loans have promissory notes?
A I can't say 100 percent. I'm saying they should have, but this is definitely a record from my computer that says these are the checks, these are the check numbers, and these are the dates that I wrote the checks, and these are all loans, to my knowledge, other than the amounts that I've told you down through there that were payment to my son for health insurance and maybe even another one. I'm not sure exactly. Seemed like I paid him for something else, but it wasn't a loan.
Q Okay. Mr. Calvert, you previously stipulated that you appeared and gave testimony at a deposition conducted on November 19th, 2012.
A And who was that with?
Q It was with the National Labor Relations Board.
A And who was the person? I'm asking you that because I appeared at several 2004 examinations.
Q Well, this actually was not an examination. This was a deposition done before you filed for bankruptcy. It was in connection --
A And who was that? Was that Mr. Lerner (phonetic)?

Q It was with Mr. Mascioli and Ms. Ramirez.
A Okay. I don't remember it.
Q But you do recall giving testimony?
A Several.
Q Okay. And you previously stipulated that you gave testimony at the November deposition.
A Yes.
Q And you recall having several other depositions taken and you stipulated to ones that happened on April 24th, August 2014, August 14th, 2014, and December 9th, 2014. These were all 2004 examinations.
A I think that's what the record says, yes.
Q Okay. Do you recall, at the August 14th, 2004 deposition that you testified --

THE COURT: Now, August 14th -- are you talking now about a 2004 examination --

MR. WARWICK: Yes.

THE COURT: -- not the 2012 deposition?

MR. WARWICK: No. Right.

THE COURT: All right. So he's asking you now about an August 14, 2004 examination, Mr. Calvert.

BY MR. WARWICK:

Q Do you recall giving testimony during that examination --
A I'm sure I did.
Q -- that you -- I'm sorry. Do you recall giving testimony

that you loaned more than $340,000 to your son, Kevin?
A I'm not certain about the numbers.
Q Is there anything that would refresh your memory?
A No. If you say that that's in the transcript, then I would agree that I said that.
Q So if I showed you the transcript and you saw what you said, you'd agree that you --
A Sure.
Q Okay. I've got an extra copy of the transcript, then, of August 14, that I'll hand you as soon as I find it. There you go, Mr. Calvert. If you turn to page 54 and look at lines 12 through 16, as I read, it says, question -- it says, "Number two, between January 1st, 2009 through August 12th, 2012, I have written checks to my son, Kevin Calvert, for a total amount of $340,000." Is that --
THE COURT: Are you reading a question or an answer, sir?
MR. WARWICK: I'm reading a question. I'm sorry.
BY MR. WARWICK:
Q So question, "It says, number two, between January 1st, 2009 through August 12th, 2012, I have written checks to my son, Kevin Calvert, for a total amount of $340,000. Was that your approximation of the loans that you had issued to Kevin?" And your answer, "I believe that was, yes."
A I see that and I agree that I said that.

THE COURT: Yeah. I think the question to the witness is, does reviewing the transcript refresh your recollection about your testimony? Does it refresh your recollection as to what you testified to?

THE WITNESS: I'd have to read all of the transcript, Your Honor --

THE COURT: All right.

THE WITNESS: -- to be able to say if this is in context or --

THE COURT: Yeah. Well, I want to make sure you understand the question. Counsel has handed you a document and has asked you if reading that refreshes your recollection, meaning that you now remember better what you said. And does it refresh your recollection so that you remember better today what you said back then? I'm not asking you what you said, but does it refresh your recollection?

THE WITNESS: Well, I see what it says, Your Honor, and the only way I can answer that is, if the transcript says that I said that, then I must have said it. I'm not sure that I remember exactly that I did say it, but --

THE COURT: Okay. That's good enough.

BY MR. WARWICK:

Q And Mr. Calvert, during that same examination but later on, you stated that the amount was actually $376,000 that you had loaned to your son, Kevin. Do you recall giving that

testimony?

A There again, if the transcript says that, and there had to be some reason why that I had said those two figures within the same breath, and I'd have to read the transcript to see if what you're saying is not taken out of context, but --

Q Well, if you want to, turn to page 57 of that transcript, yes.

A I'm talking about the whole transcript. I'm not talking about one page.

Q Okay. But you're willing to say that, if you said that during the deposition --

A If that's what that says, then I'm sure I said that.

Q -- then you said it. Okay. That's good enough for me, Mr. Calvert. And then, in that same examination, would you agree that it says in the transcript later that you actually had loaned $318,658 to your son, that you said that?

A What you're saying really doesn't make a lot of sense, but what page are we talking about?

Q I understand. Now, I'm on page 57 through 58 of that transcript, lines (sic) approximately 25 at the bottom of page 57, lines one and two at the beginning of page 58.

A You're saying 318,630 --

Q Right.

A -- not 18,000.

Q No, 318,000.

A Okay. Maybe I didn't hear that. Okay. Yes.
Q So would it be fair to say that, during the same examination, you gave three different answers for how much money you've loaned to Kevin Calvert?
A That would be fair, that I listed those numbers, yes.
Q But with regards to loans to your son, you said a majority of them were actually documented and signed promissory notes?
A Yes.
Q And based on that spreadsheet we saw earlier, you made a significant amount of loans. It wasn't just one loan for a large amount of money, but it was loans over a period of time.
A That's correct.
Q And you don't recall how many of those loans were documented in the promissory notes?
A No, sir. I don't.
Q Would you say most of them?
A Yes, sir.
Q And at the time you made most of those loans, those promissory notes were signed by both you and Kevin?
A Yes, sir.
Q And those notes would have documented the amount of the transaction --
A Yes, sir.
Q -- and the date the transaction happened --
A Yes, sir.

Q -- and the terms of the loan?
A Yes, sir.
Q And would you agree that, since you filed your bankruptcy petition, the NLRB has repeatedly requested you to provide those signed promissory notes?
A And I've repeatedly told them that I could not find that folder.
Q My question was, do you recall that we asked you for those signed promissory notes, not what you provided?
A Yes. You did ask.
Q And repeatedly, John Petr, I believe, the Trustee, had asked you for those signed promissory notes?
A For signed promissory notes?
Q Yes.
A Yes.
Q And have you submitted any signed promissory notes to the bankruptcy trustee?
A No.
Q And have you submitted any signed promissory notes to the National Labor Relations Board?
A No.
Q And is it your position that you just lost these promissory notes?
A I said I cannot find the folder, yes.
Q All right. Mr. Calvert, I'm going to again change gears a

little bit here and we're going to go back to your bankruptcy schedules, so if you want to flip back to tab one and actually go to page 39 of 57, it's your statement of financial affairs.

A Of what page? I'm sorry.

Q 39 of 57.

A Yes. Okay.

Q Okay. Do you see number one there, where it says an income from employment or operation of a business?

A Yes.

Q And it says right there your only income are three years' worth of rental incomes. Correct?

A That's correct.

Q And do you recall that, during the first meeting of creditors in January 2014, you testified your income was derived solely from Social Security and rental income? Right?

A Probably, yes.

Q And Mr. Calvert, do you specifically recall that, when you were asked whether you had any other sources of income, you said that you did not?

A Regular income, yes.

Q Mr. Calvert, you filed your petition in December of 2013?

A December 19th, I believe, yes.

Q And would you agree, during 2013, that you performed consulting work?

A In 2013, before I filed the bankruptcy?

Q Yes.
A Yes. I had done two projects. Yes.
Q And you would have been paid for this work?
A Yes.
Q Okay. Would you look at Exhibit 12 for me? Do you recognize that document?
A Yeah, yeah. It looks like my 1040, tax.
Q So you see line 12 there, where it says, "This is income" $17,072?
A Yes.
Q Was that income from your rental?
A No.
Q Or I'm sorry. Was that income from your consulting work?
A Yes.
Q But if we go back to your statement of financial affairs, under income from employment or operation of business, it's not listed.
A Yes. I didn't have a business.
Q But you had income.
A I had some income. Yes. It was from my business.
Q And it's not listed under number one, a yes or no question.
A In my bankruptcy petition?
Q On your statement of financial affairs, page 39 --
A Let me see this. My bankruptcy petition was -- that's

what I had, I understood, as of the date that I filed the bankruptcy petition.

Q So in number one, where it says income from employment or operation of the business, you did not list --

A I didn't have --

Q -- that consulting income.

A No. I didn't have a business.

Q But you -- okay.

A And at the time that I filed my bankruptcy petition, I did not have any other income coming in.

Q I didn't ask you a question, Mr. Calvert.

A Okay.

Q So just to be clear, during 2013 and 2014, you issued invoices for consulting work that you performed. Right?

A 2013 and 2014?

Q Yes.

A I don't remember any in 2014. 2013, I did.

Q Okay. If you want to, flip to Plaintiff's Collective Exhibit 8.

A Okay.

Q Do you recognize those documents?

A Yes. Uh-huh.

Q What is Express Consulting?

A That was a name that I had just made up arbitrarily.

Q Why did you choose Express Consulting instead of saying

Billy Bob?

A I should have said Billy Bob. You're right. It was just a mistake. It did nothing but confuse everybody.

Q Do you recognize the dates that these invoices were issued?

A Yes, sir, and 2/11 of '13, and then there were some later on for the second job I did, 4/16 of '13. Do you want me to go on? But I don't see any there on the -- in 2014.

Q Let's look at page -- it's the very last one in there. It says eight at the bottom. It's not actually in that order. It looks like an invoice was issued under your personal name. Do you recognize that document?

A Yeah. Well, it's not -- let me think here just a minute.

Q Well, it's just -- I mean, if you recognize the document, that's all I need to know for a moment.

A But it wasn't an invoice from me. It was, I believe -- yes. Maybe it was from me. I had been asked to have somebody inspect this service at this house. Earmco (phonetic) did the work. I paid Earmco for the work. And so then I went ahead and I --

Q Invoiced what it --

A It was to reimburse me for what I'd already paid to Earmco, yes.

Q And so you got paid.

A Yeah.

Q And this is August 30th, 2014?
A Yes.
Q Okay. So you did work, issued invoices, and got paid for that work throughout 2013 and 2014.
A Yes. I did.
Q Okay. Mr. Calvert, I'm just curious.
A Yes.
Q Did you ever do any work in 2013 and 2014 for which you did not issue invoices?
A Not that I can remember.
Q Okay.
A I mean, unless I helped somebody do something or --
Q Is it possible? Is it possible that you did work?
A Not that I can remember. I mean, like I said, unless I would have helped somebody to do something.
Q Okay.
A I've helped a lot of people do a lot of things.
Q Okay. But looking through these invoices, you recall doing this work, and issuing these invoices --
A Yes.
Q -- and getting paid for this work.
A Yes.
Q Mr. Calvert, let's look at Plaintiff's Exhibit 7. These aren't quite as long as your bankruptcy schedules, but they're a little bit longer than your invoices. Now, just take a

second to flip through those, if you don't mind.
A Okay.
Q Do you recognize these documents, Mr. Calvert?
A Yes. I believe I do.
Q These are checks that were issued to you --
A Yes.
Q -- and payment for your consulting work?
A No.
Q None of these are for payment of your consulting work?
A Some of them.
Q But not all of them?
A No.
Q Mr. Calvert, you deposited these checks into your wife's bank account, didn't you?
A Yes.
Q Okay. Let's look at Exhibit 11, then. Do you recognize these documents?
A Yes.
Q And these were all -- and this is your wife's deposit detail from her bank account. Right?
A It was a computer-generated QuickBooks, in fact, we pulled for the money that we had deposited in Linda's Chase bank account.
Q The same bank account that you deposited your checks from consulting.

A Yes.
Q So your consulting income went to your wife's bank account.
A I have no other bank account.
Q Yes or no question, your consulting income went to your wife's bank account.
A Well, that's your yes or no questions. Yes. It went into our account or my wife's bank account.
Q The same consulting income that's not listed on your bankruptcy schedules.
A Yes.
Q All right. Mr. Calvert, let's go back to your statement of financial affairs --
A Yes.
Q -- tab one, page 39. And let's flip down in there until we get to item 18, which is on page 45. Let me know when you get there.
A Okay.
Q You see now 18, where it says nature, location, and name of business?
A Yes.
Q Do you recognize those four businesses?
A Yes.
Q How come Express Consulting isn't on there?
A Because Express Consulting was not a business.

Q Is Express Consulting the name of somebody?
A It's a name that I had made up.
Q To conduct business under?
A Just to bill under, yes.
Q Okay. All right. Let's look back to Exhibit 7. It's the checks.
A Where are we at now?
Q Exhibit 7, tab seven.
A Okay.
Q Okay. And it's about halfway through those. It says 15 at the very bottom. It looks like a handwritten 15.
A Okay.
Q Do you recognize the date on there? Can you read the date of that check right there in the note?
A December 9, 2013.
Q And this check is for $10,000?
A Yes.
Q And this check was deposited into your wife's bank account.
A Yes.
Q And this check was made out to you --
A Yes.
Q -- but not your wife?
A No.
Q Then why would you put it in your wife's bank account?

A Because that's the only bank account that we had to put checks into.
Q That you guys both had?
A Pardon?
Q You said, "That we had," the only bank account that you guys both had?
A Yes. My wife put checks that came like Social Security checks -- let me make it clear for you. We got Social Security checks that my wife got and she deposited in a bank account or I deposited her checks for her. No. It was really direct deposit, now that I think about it. And then I had Social Security checks that came in, but since I have no bank account, because we had to close the bank account because the NLRB had taken all the money, both my wife and my money, then we only had the one bank account that we could put money into.
Q Your wife's --
A My wife's.
Q -- that you put Social Security money into.
A I put all of it. I put any money into it.
Q Including checks like this that were made out to just you.
A Absolutely.
Q Okay. Okay. Then let's go back to schedule B under Exhibit 1. I'll give you the page number here in just one second, page eight of 57. Do you see number two there, where it says checking, savings, or other financial accounts, et

cetera?
A Yes.
Q There's more language there. Your wife's Chase account is not listed there, is it?
A On number two?
Q Under number two.
A My wife's not part of my bankruptcy.
Q No. But you had money in that account. Right?
A But it's not part of my bankruptcy.
Q That's not my question. You had money in your wife's bank account.
A Money went in and it went to pay our bills.
Q Again, not my question -- you deposited money into your wife's bank account.
A So I have to -- yes. I deposited my Social Security check and --
Q And your wife --
A -- other checks into that account.
Q And your wife's bank account is not listed in your bankruptcy.
A In my wife's bank account. My wife was not a part of this.
Q Again, not my question.
A But it's --
Q It's not listed here, is it?

THE COURT: All right. Counsel, you're being argumentative. You need to let him answer the question.

MR. WARWICK: Okay. I apologize, Your Honor.

THE COURT: So what's your question?

MR. WARWICK: That his wife's bank account --

THE COURT: He's answered that question several times.

MR. WARWICK: Okay. Okay. Then we're done with that line.

BY MR. WARWICK:

Q Mr. Calvert, you used your wife's bank account to pay bills. Right?

A Yes.

Q Okay. So let's look at number one on that same page. It says cash on hand and on the person.

A Yes.

Q It says $10.

A Yes.

Q And that was as of the filing of your bankruptcy petition.

A Yes.

Q But do you recall that check we looked at on December 9th for $10,000?

A Yes.

Q That's not listed here, is it?

A No.

Q And you received that 10 days before you filed for bankruptcy.
A Yes. I was told that, that was cash on hand, meaning cash in my pocket, in hand.
Q Okay.
A The other money has already been distributed to pay bills.
Q Okay. So almost done, Mr. Calvert, I promise, and I do apologize earlier for getting headstrong about where I was trying to go.

THE COURT: No problem.

MR. WARWICK: Okay.

BY MR. WARWICK:
Q Can we look at Exhibit 7? It's those checks, Mr. Calvert, that you reviewed earlier.
A Yes.
Q Now, all of those checks -- and please correct me if I'm wrong -- are made out to you. Right?
A No. There's one here made out to Ed and Linda Calvert.
Q To Ed and Linda Calvert?
A Edward and Linda Calvert --
Q Okay.
A -- for $2,534.56.
Q But the rest of them are all to you?
A Well, I don't know. I have to check the rest of them.
Q Okay. No rush, I'm sorry.

A There's another check here made out to Edward and Linda Calvert for -- could be $533.95 or 99.

Q Okay. So it's made out to both of you --

A Yes. Uh-huh.

Q -- both of these checks.

A Yes. There's another check made out to Edward and Linda Calvert for $190. And I believe that's all.

Q Okay. And all of these checks, the three that were made out to your wife and you, and then all the others that were made out to just you were deposited into your and Linda's Chase account. Right?

A Into Linda's Chase account. It was the only bank account we had.

Q Okay. Thank you, Mr. Calvert. Now, let's look at Plaintiff's Exhibit 13. It's the exhibit that I had Ms. Luther testify to.

A Yes.

Q Did you know Mr. Adair?

A Yes, by name and I might have recognized him back then, probably wouldn't today.

Q And you knew, by laying him off, he would no longer receive pay from ELC Electric. Right?

A Well, if I laid him off, no, he wouldn't.

Q And he would not be able to participate any longer in your 401(k) at the time you laid him off.

A No, I would -- into the match -- if I still had the match one at that time, which I'm not sure if I did or not, but there was provisions underneath the law for a person and I believe that they got notices from the people that had a 401(k) account, just like you can still participate in insurance programs by COBRA or whatever, so I'm sure he could if he wanted to.

Q But you knew at the time that he would no longer receive the employer match if it existed.

A I don't know if I had the employer match at that time.

Q That's why I said existed.

A If it existed --

Q Yes.

A -- yes, he would not get that match if it existed.

Q So at the time you laid him off, you knew he would no longer receive health benefits from ELC.

A Not from ELC, but he could have continued them with COBRA.

Q And at the time you laid him off, you knew that he could no longer vote for a union in ELC.

A Yes.

Q And is that the same with all these men on this list?

A Could they vote for a union?

Q Did you know at the time that they would no longer receive pay when you laid them off? Did you know that they would no longer receive a matching 401(k) benefit? Did you know that

they would no longer receive insurance from ELC? And did you know that they would no longer be able to vote for the union?

A My answer is the same. They could receive the insurance under COBRA and they could have continued their 401(k)s without the match, yes.

Q All right.

A Yes.

Q But they would have lost certain things.

A Yes.

MR. WARWICK: Okay. Thank you, Mr. Calvert. I have no further questions. I'm not really sure how --

THE COURT: Well, here's what we're going to do.

MR. WARWICK: Okay.

THE COURT: Mr. Calvert, you have a right to cross-examine yourself, which means that you have a right to ask yourself questions to explain the testimony that was elicited from you, that was asked of you during your direct examination. And that normally would happen in question and answer form. If you want to explain any of your testimony that was elicited by the questions asked of you during direct, I'm going to let you narrate it, which means you just tell us what you want to say.

You're still under -- you've still been sworn and you're under penalties for perjury, and if, as part of your narration, anything you say is objectionable, counsel will

object. If he does object, I want you to stop talking until I hear the objection. Okay? So if you wish to, you don't have to, but if you wish to at this time provide further testimony to explain or elaborate with regard to the direct examination, you may do so.

THE WITNESS: Yes. Yes.

THE COURT: Do you wish to do so?

THE WITNESS: I'd like to.

THE COURT: All right. You may go ahead.

THE WITNESS: Can I get some notes off of my paper that --

THE COURT: Yes. You may.

THE WITNESS: Okay.

THE COURT: And Mr. Calvert, what you testify to now should relate to the direct examination, the questions and answers you gave, the questions from NLRB counsel, and the answers you gave.

THE WITNESS: If I can remember them all, Your Honor --

THE COURT: I understand, I understand. You'll have an opportunity to go beyond that if you wish to later on, but right now, this is effectively cross-examination.

THE WITNESS: I've tried to write down as much as I could --

THE COURT: All right.

THE WITNESS: -- while I could so I could remember some of this stuff.

THE COURT: Now, before we start, what do you have there in front of you?

THE WITNESS: I have my --

THE COURT: I would like for you to show those to -- counsel, will you look at the notes that Mr. Calvert is going to refer to when he testifies --

MR. WARWICK: Yeah. That'd be fine.

THE COURT: -- so that you have familiarity with them?

MR. WARWICK: Sure.

THE COURT: Do these include exhibits you wish to admit into evidence?

THE WITNESS: No. These are some exhibits -- well, as you know, Your Honor --

THE COURT: Yeah.

THE WITNESS: -- I didn't get the notice that you were going to not allow me to call the judge from before --

THE COURT: Yeah.

THE WITNESS: -- on Friday.

THE COURT: Judge Sanders.

THE WITNESS: I'm sorry. I call him Judge Sanders. Before Friday.

THE COURT: Yeah. And we're not going to get into

that.

THE WITNESS: Exactly. And --

THE COURT: All right.

THE WITNESS: -- all the exhibits that I put together is really not worth the paper that they're written on --

THE COURT: All right.

THE WITNESS: -- if that. So I sat down through the week and I tried to come up. And when I got your --

THE COURT: Ruling.

THE WITNESS: -- ruling, it was very informative as of what I should have been looking at.

THE COURT: I'm with you.

THE WITNESS: So I sat down, and went through some more --

THE COURT: Okay.

THE WITNESS: -- and marked down, but I didn't have time to get them in. I didn't have time to --

THE COURT: That's no problem.

THE WITNESS: -- get them to these -- so I just didn't do anything.

THE COURT: All right. I'm with you. I'm with you. My only question is, in connection with the testimony you're about to give, are there any documents you wish to have admitted into evidence?

THE WITNESS: At this point?

THE COURT: Yes.

THE WITNESS: Yes, sir, all of these documents here that I've --

THE COURT: Have you marked those?

THE WITNESS: Yes, sir.

THE COURT: Why don't you show those to counsel?

THE WITNESS: So now, do you think they would be admissible? Or I would have tried to make copies of them.

THE COURT: Well, we don't know whether they are admissible yet. We're going to -- how many are there?

MR. WARWICK: From what I'm holding, they go from K to W and I don't know if there's other -- is there A through K?

THE WITNESS: That's these ones that I've already got here.

THE COURT: All right, that you took out. Okay.

MR. WARWICK: Okay.

THE COURT: So counsel, why don't you look at K through W and see whether or not there are any of those that you object to?

MR. WARWICK: Okay. We haven't seen these before, so can I consult with co-counsel?

THE COURT: Sure, absolutely, go ahead.

(Counsel confer.)

MR. WARWICK: Mr. Calvert, here are --

THE WITNESS: Yes.

MR. WARWICK: -- your exhibits. Your Honor, there's exhibits in there that we just don't know the relevancy and I assume he'll put it in context before he puts it in, but we don't have a copy to follow along as he's doing it, which is the only kind of problem.

THE COURT: All right. Well, we can make copies. Hand this to them, please.

MR. WARWICK: Thank you, Your Honor.

THE COURT: I'll tell you what. We'll take about a 10-minute break.

MR. WARWICK: Okay.

THE COURT: We'll come back at quarter until 12:00.

MR. WARWICK: Thank you, Your Honor.

THE COURT: Mr. Calvert, you're free to move around --

THE WITNESS: Thank you, sir.

THE COURT: -- until we come --

(Recess taken from 11:33 a.m. to 11:45 a.m.)

(Counsel confer.)

THE COURT: All right. So the question is, with respect to Mr. Calvert's proposed exhibits K through W. Does the NLRB have objections to admissibility?

MR. WARWICK: There's just a couple I'd like him -- I just don't -- well, let me -- if it's okay --

THE COURT: And you can reserve with relevance.

MR. WARWICK: I reserve. Yeah. I reserve my objection on relevance, but otherwise, I don't.

THE COURT: All right. With the exception of reservation of objections regarding relevance and arguments thereto, Mr. Calvert, are you proposing the admission of these exhibits, K through W?

THE WITNESS: Yes, sir. I'd like to.

THE COURT: Then Exhibits K through W are admitted without objection. So go ahead and proceed, Mr. Calvert. And I want to say to you, you're not under compulsion to testify. This is only if you want to.

THE WITNESS: Well, I do really want to.

THE COURT: And once again, it should be responsive to the questions you were asked and --

THE WITNESS: Yes, sir. I'll try.

THE COURT: Okay. Then proceed.

THE WITNESS: If I get off track, Your Honor, I'm sure you'll let me know.

THE COURT: I'll try.

THE WITNESS: I think the first thing that was talked about was about the election that we had at ELC Electric to try to remain union-free. The union did campaign, and try, and organize my company. I had talked to several people. They were not particularly fond of joining a union. And --

THE COURT: When you say several people, you're

talking about employees?

THE WITNESS: Yes, employees, yes.

THE COURT: Okay.

THE WITNESS: And as I understood what was my right, I had talked to labor attorneys and different other people to see what to do. And they said that I should have a campaign and try to tell my employees what the pros and the cons of joining the union will be. And I did send out these letters. I sent them out to everybody.

THE COURT: Okay.

THE WITNESS: I sent them out, telling the people that me being a union contractor at one time and knowing some of the things that went on, knowing that they would not be guaranteed full employment. In fact, many times, they spent a lot of time either sitting on the bench or having to go to other places to work because the union couldn't provide them work.

And I tried to list these things when I told the people. I had a lot of people that were making the equivalent of union wages. I stressed that the union did not give them paid holidays like our company did. I stressed that the union did not give them a 401(k) match like our company did. And I stressed other things, other reasons why I wanted them to know, so they could make informed decisions. In fact, I think my letters to them was, know the truth. I did pull off on what I

got from page, I believe, five through nine, that the prosecution has given in their --

THE COURT: Did you provide Exhibit 6 now?

THE WITNESS: I'm on Exhibit 6, yes, sir. I pulled that off of some literature I had gotten that was saying to give these to the employees. And these were things for them to think about. So yes. I did do that. We had the union election and there was a -- whether it's an NLRB or a government representative there, I'm not sure who it was, and some other people there looking on. I'm not sure who they were.

But we won the election. And before the election was certified, the ALJ or the union filed with the ARJ, wanting to have another election. And this time, instead of the bargaining unit that was there working at ELC, the judge ordered that people who had left ELC and was then working for union contractors -- that they were to be included in the bargaining unit. And let's see if I submitted the things. I'm not sure. But the reasoning for the judge's decision on this, he said, was because some of these people had quit ELC based on ELC's many NLRB violations and claims that we had committed.

Now, I will have to tell you -- and it's not one of the things that I put into evidence but I have with me today if you'd like to see it -- some of the claims, which let me say were later recalled or the NLRB -- I forget what they said on

the letter, that they no longer wanted to pursue these claims. But one of the claims was that one of our employees had been issued a key to a lockbox. And therefore, we took his key to give to another employee because of some union animus against that employee, which was foolish. The next one was that --

THE COURT: All right.

THE WITNESS: I'm sorry.

THE COURT: Mr. Calvert, I think you're drifting.

THE WITNESS: Okay.

THE COURT: What you started to say was or what you testified to was, there was an initial election. When was that initial election?

THE WITNESS: I'm sorry, Your Honor. I don't --

THE COURT: Okay. But then you said your testimony was that the union asked for a subsequent election. And did the NLRB order a second election?

THE WITNESS: Yes, sir.

THE COURT: All right. So what happened then?

THE WITNESS: Well, we never got around to having that other election.

THE COURT: All right. So you didn't have that election.

THE WITNESS: No.

THE COURT: So what's next?

THE WITNESS: No. So okay. That probably wraps that

up. I'm trying to think as I go, Your Honor. The next one was the use of temporary agencies.

THE COURT: Yes.

THE WITNESS: Many contractors and many other people who use temporary agencies for a long period of time -- that's why there are so many temporary agencies around. I elected to use temporary agencies for my manpower strictly because of a certain bunch of incidents that occurred and not to get rid of the NLRB bargaining agent as the prosecution wants you to believe.

THE COURT: Well, they're not the prosecution. You're talking about the NLRB.

THE WITNESS: The NLRB, I'm sorry. Okay.

THE COURT: Okay. So you're now testifying about a decision you made in the spring of --

THE WITNESS: Laying off the people.

THE COURT: Yeah. And that's -- okay. And that was the spring of 2003. Correct?

THE WITNESS: Correct, I think.

THE COURT: All right. All right. And what else do you want to say about that?

THE WITNESS: Well, what led up to that was that we were doing several prevailing wage projects, prevailing wage or common wage projects such as schools, and hospitals, and several others where the wage is listed. It got to be the

place where every prevailing wage project that we did, the Indiana Department of Labor would audit us.

Those auditors, those audits cost a lot of money, both to get an attorney plus all the manpower we would have to spend. And they would inevitably find problems. Sometimes, it was because we didn't pay the right wages, they said. Sometimes, it was because we didn't pay the right benefits, they said. And you have to understand that the wages and the benefits on common wage projects are subjective.

They're subjective to the people who's doing the audit because they have skill levels at the common wage projects which, in my case, was an electrician, was a helper, was a person with experience, and a person without any experience. It didn't matter how we would classify a person. They would always come back and say that we didn't classify them correctly.

THE COURT: Okay.

THE WITNESS: There was nothing, there was no description of what each one of these positions were.

THE COURT: Got you. So I understand your testimony to be that it was in response to the difficulties you were having with regard to the Indiana Department of Labor audits. And you chose to do what?

THE WITNESS: I chose to go to temporary employees for the main reason that, using temporary help, I could

negotiate a rate with whatever company that I decided to go with. And that rate included the wage that they were supposed to pay on prevailing wage projects, the benefits they were supposed to pay on prevailing wage projects, the Indiana and federal taxes, and insurances, and everything else that they were obligated under the law to pay.

That one rate took care of everything. That way, on any other future project that I did, I would not be responsible for any audit. The company that I used the labor from would be responsible for the audit. And this in turn saved the company a ton of money.

THE COURT: All right. So I understand your testimony to be addressing --

THE WITNESS: Okay.

THE COURT: -- the decision you made in spring 2003. What else?

THE WITNESS: The people that were laid off -- first of all, on March 7th, I think, this is Exhibit K.

THE COURT: Okay. You're talking about March 7 of --

THE WITNESS: Of 2003.

THE COURT: All right.

THE WITNESS: Okay. I sent each employee a letter stating that this is what we would have to do. We were transferring our workforce. And it also talks about --

THE COURT: Right. Well, you don't need to read me

the letter.

THE WITNESS: Okay.

THE COURT: But your testimony is that you sent a copy of Exhibit K to each of ELC's employees --

THE WITNESS: Yes.

THE COURT: -- on or around March 7, 2003?

THE WITNESS: Exactly.

THE COURT: All right. What next?

THE WITNESS: My testimony is that I also submitted Defendant's Exhibit Q --

THE COURT: I don't -- let me take a look at Q.

THE WITNESS: -- to those employees.

THE COURT: All right. So you would have sent a copy substantially the same as Defendant's Q to each of the ELC employees --

THE WITNESS: Exactly.

THE COURT: -- on or around March 7, 2003. Is that correct?

THE WITNESS: Exactly.

THE COURT: All right. Then what?

THE WITNESS: And these letters, because I did care about the employees, stated that --

THE COURT: Well, you don't need to read the letters to me.

THE WITNESS: Okay. But they gave the employees the

chance to immediately go back to work on the same jobs where they were working at the same amount of money they were working with the same or better benefits that they had received without missing a beat.

THE COURT: Okay.

THE WITNESS: And it was their choice to whether they would do this and work or not have a job and not do this, I guess.

THE COURT: All right.

THE WITNESS: So under the malicious and --

THE COURT: Well, I don't want you to argue at this point.

THE WITNESS: Okay.

THE COURT: I want you to just testify about what happened.

THE WITNESS: Okay. Okay. So anyway, that's what I did then.

THE COURT: All right.

THE WITNESS: I submitted Exhibit M, which was nothing more than an ELC Electric clean sheet of paper letterhead.

THE COURT: Let me see. You submitted M to who?

THE WITNESS: M.

THE COURT: M. I'm looking at M and it's --

THE WITNESS: M. That tied into -- maybe I can't do

that, but I just wanted to show the Court --

THE COURT: You submitted -- okay.

THE WITNESS: -- Exhibit M.

THE COURT: And what's the significance of M? You said --

THE WITNESS: That was to show the Court that at any time -- and I can't remember exactly the documents. I'll think of it in a minute.

THE COURT: Are you suggesting that Exhibits K and Q were sent under that letterhead? Is that what you're --

THE WITNESS: Yes.

THE COURT: All right. Okay. I got that. So what's next?

THE WITNESS: Bear with me, Your Honor. I'm trying to go --

THE COURT: No problem.

THE WITNESS: There was quite a bit of talk about why I did not submit or did not answer the questions regarding my bankruptcy proposal.

THE COURT: Say that again.

THE WITNESS: There was questions why that I left off or didn't put in some of the things to --

THE COURT: Yes.

THE WITNESS: -- the bankruptcy --

THE COURT: Schedules, yes.

THE WITNESS: -- schedule. First of all, I had went back and forth with Mr. Tucker's -- who is a bankruptcy attorney, as you know, Your Honor --

THE COURT: Uh-huh.

THE WITNESS: -- with his associates, Michelle Murray, and I can't think of the other girl's name, on several occasions, to try to make sure that we got the bankruptcy documents right.

THE COURT: Okay.

THE WITNESS: When it came to listing anything under, like, a business, I did not feel then and I do not feel now that the amounts of money that I received from these two projects was a business. I've set up in my lifetime six businesses.

THE COURT: Yeah.

THE WITNESS: And each business, I got a certificate from the State of Indiana. I got a license from the or a number from the federal state (sic). I set up a telephone line. I had stationery. I set up an accounting system. I had business cards, and so forth, and so on. That is a business to me. So I didn't list that as a business because, to me, I had none of those things. I had never gotten those things. I had never advertised for any of this work. These long-time friends came to me with these two projects, knowing that I had expertise in this subject, and asked me if I would help them.

And I did.

THE COURT: All right. I understand your testimony on that. What else?

THE WITNESS: The name that I brought up, like I say, I should have called it anything rather than Express, being that my son -- and I didn't even think about that -- had Express Consulting, which he had incorporated, for which there was a business entity, but nothing of mine, never has been. But I chose a wrong name.

THE COURT: Understood.

THE WITNESS: I did this for billing purposes only and I did not think that I had to list this money because this was prior, number one, before I filed any bankruptcy. And in the way I was thinking, when I filed the bankruptcy papers, it's what do you have today, and here is the assets.

THE COURT: Now, are you addressing the $10,000 check at this point?

THE WITNESS: I'm addressing everything, Your Honor --

THE COURT: Okay. All right.

THE WITNESS: -- the $10,000 check and all the rest of my assets.

THE COURT: All right. I'm with you.

THE WITNESS: I've been questioned regarding my wife's bank account --

THE COURT: Yes.

THE WITNESS: -- extensively.

THE COURT: Uh-huh.

THE WITNESS: The NLRB went to the court, the Southern District of Indiana, ex parte, and in my opinion sold the judge incorrectly on issuing a PRO against me, without --

THE COURT: PRO.

THE WITNESS: Yeah, without -- a protective order without my knowledge. At that time, when the judge did that, it came in and they confiscated all the money that my wife and I had in our joint bank account --

THE COURT: Got you.

THE WITNESS: -- of which my wife, needless to say, is not a part of this proceeding or never has been. I got a letter from the Fifth Third Bank. That's --

THE COURT: Exhibit O?

THE WITNESS: -- Defendant's Exhibit O that states how much they got --

THE COURT: All right.

THE WITNESS: -- and about them sorry and that this had to happen. Again, it was my wife. That's part of her money and, as of yet, I've not seen her half of the money that's been given back to her. I assume they will sometime. So when that happened, then my wife had went out. She set up a Chase bank account in her name only because common sense tells

me that anything that we would have put back in that joint account, the NLRB would have taken with no consideration of the bills that we had to pay.

It didn't make any difference. So my wife set up the account. And we had one bank account. And that account was where all of our money went to for the reasons that we needed to have an account to pay our bills. We needed to write checks to pay our bills. And so my Social Security check was directed into that account.

My wife's Social Security check was directed into that account. If I sold a vehicle, which I'm not even sure I did, that money would have been directed into that account. And I'm not talking about getting rid of assets while a bankruptcy proceeding was going on. Don't get me wrong. But when I did this work or when I got paid for this, those funds had no place else to be deposited but to that account. And immediately, when they were deposited, they were used to pay checks with. It wasn't deposited in any type of --

THE COURT: Used to pay bills?

THE WITNESS: Used to pay bills. I'm sorry. There was not a deposit in any sort of a savings account or nothing of that nature. As soon as it went in, it went out. And in fact, some of it went out to pay attorney fees. So yes. I did deposit it in her account because it was the only account that I had to deposit checks.

THE COURT: All right. What else?

THE WITNESS: There was a thing I was questioned about, the signed promissory notes.

THE COURT: Yes.

THE WITNESS: I stated at the time that I was asked that I could not find the promissory notes. Ms. Ramirez, who's in this courtroom, could testify that, when she came out to my office, that I had probably in excess of 100 boxes, file boxes, full of personal and employee records, and job cost, and all sorts of things. So in fact, I still have 40 of the boxes that the NLRB wanted to see, they reviewed, and they sent back to me.

And I still have them saved until this whole process is over with. So yes. I could not find the one folder that had the signed promissory notes. Now, I did have and I went back into the computer -- and since I have done everything primarily on my personal computer regarding this stuff and QuickBooks, I went back in and I had where I could find the rest of the promissory notes that I made out to my son. It contained the date. It contained the amount. It was from my wife and myself, the loans were, and it contained the interest rates. I made a copy of this note and of this record and gave to, I believe, the NLRB and also to the trustee, Petr.

I told him at that time I couldn't find the signed ones, but these are the ones and the dates out of the computer

prove that I didn't just backdate something and submit it. But I gave them this testimony probably 50 times. Everybody knows that I didn't have the promissory notes. I couldn't find the promissory notes, but I did give them copies of them on my computer that contained all of the promissory notes.

THE COURT: All right. What else?

THE WITNESS: Probably the next and the last that I can think of is regarding the number of amounts of loans that have been given by me to the loans of my son.

THE COURT: Yeah.

THE WITNESS: As the NLRB alluded to in one of their documents, this is a very complex issue. This was not of my making. It was not by design, but to explain, a brief that Tucker wrote down, the $274 represented one-half of the money that was loaned to my son because half of the money came from my wife and half of it came from me.

Trying to give a more detailed and better accounting, I went back many, many times and did several things. And this is why the money became so complex. First of all, I had some saved cash that I had, that I had loaned to my son, kept at home. The NLRB questioned me at length at where I kept it and I denied telling them exactly where I kept it, but I kept it in a safe at home.

I also had my wife's pension and my pension, her pension, and I think this is also -- her pension contained

$200,000 some. My pension was $200,000 or $300,000. As we started to loan our son money because of his need, it was set up originally where my wife and I would have saved that for when we retired, a $4,000 a month pension. That included for both of us. I don't know the exact breakdown. But I know the money came out of each one of our accounts.

As it started to where we were going to have to loan our son money, I set up with the pension people where I would call them and tell them how much money that I needed. And they would transfer that amount of money into our joint checking account. Also in this equation came that my building was not rented and it was costing me approximately $10,000 a month to maintain the mortgages, and the utilities, and all of these things.

So not only was I having to take money from these two accounts, but I was -- so when I would tell the people at the pension place, "I need $20,000," for example, they would put $20,000 in our joint checking account. I maybe needed son to pay -- or maybe need the $10,000 to pay bills and pay this. And then my son may have needed the other $10,000. So it was a fiasco there to really go back and keep track of, let alone, when our 401(k)s were put -- each one of them were put in several different stocks, and mutual funds, and whatever.

And they wrote it all in cash. So when I would call the people at Edward Jones and tell them this is how much I

needed, they would go through and they would find out where was the best place to get cash and the easiest place to get cash from. There might be some stocks that needed to be sold quicker than others or whatever.

So they withdraw maybe this much from this account and another certain amount from another account. As long as they come up with the total amount of money, then they would transfer it over to our joint Fifth Third account, where we would then loan our son money, some of it, and then we would pay bills with some of it.

THE COURT: All right.

THE WITNESS: I tried to go back through and I tried to get with Edward Jones and tried to cipher through how much money actually, out of these transactions, went to my son, how much came out of my wife's account, how much came out of my account, and it was a nightmare. I probably should have, in hindsight, left it all alone and left the $274,000. But any number that I have given, I have tried to give spreadsheets and things like that to the NLRB to show what I was trying to do. So if that was a mistake on my part, then that was a mistake. That's what it amounts to.

THE COURT: All right. I understand your testimony. Anything else?

THE WITNESS: I don't think so, Your Honor.

THE COURT: All right. How do you want to do -- how

much redirect do you have, limited to his cross-examination testimony?

MR. WARWICK: I'm not even sure we have any.

THE COURT: All right. If you don't, then we can ask Mr. Calvert to sit down now.

THE WITNESS: Thank you, sir.

THE COURT: All right. Thank you. Okay. So you have additional witnesses?

MR. WARWICK: No. That is our case-in-chief, Your Honor.

THE COURT: You're done. Okay. Mr. Calvert, do you have anything more?

MR. CALVERT: No, sir.

THE COURT: Wonderful, wonderful.

MR. WARWICK: We want to kind of hang out with you until Friday, if that's okay.

THE COURT: No. No. All right. Let's talk about where we go from here. Do you want to file a post-hearing brief? I'm not asking you to do. I'm asking if you want to. I think I understand the arguments because of the summary judgment motion. But do you want to file something more?

MR. WARWICK: Well, I guess that depends on -- I'm sorry. Let me stand up, Your Honor. I guess that depends on whether we'll be ready to give a closing argument. We would like to have the opportunity to tie the testimony that's come

in to at least some of the legal standards under 523 and 727. But if we can do that orally in closing, I don't necessarily think we need to rehash again --

THE COURT: How long do you need to do that?

MR. WARWICK: Can we go on a short break and then maybe --

THE COURT: Yes.

MR. WARWICK: -- a 10-minute closing --

THE COURT: Sure.

MR. WARWICK: -- if we can put that together?

THE COURT: Absolutely. Do you want to take a lunch break or what do you want to do?

MR. WARWICK: That would be wonderful, Your Honor.

THE COURT: All right. Why don't we come back -- do you want to come back at about 10 after noon? I mean 10 after 1:00. I'm sorry, 10 after 1:00?

MR. WARWICK: I think that gives us sufficient time.

THE COURT: Is that sufficient if we come back before or after, whatever you want to do? Do you want to take a full hour or what do you want?

MR. WARWICK: Well, let's come back at 1:30.

THE COURT: All right. 1:30. Come back at 1:30. You have 10 minutes. You have 10 minutes. All right? So we're done.

MR. WARWICK: Thank you, Your Honor.

THE WITNESS: Thank you, Judge.

THE COURT: Thank you.

(Recess taken from 12:19 p.m. to 1:33 p.m.)

THE COURT: Before we recessed, I think our agreement was that each side would have 10 minutes for closing argument. Ready to go, NLRB?

MR. OWENS: Yes, Your Honor.

MR. CALVERT: I have a question, Your Honor.

THE COURT: Sure.

MR. CALVERT: All of these things that I -- these exhibits that I have made up, these five copies, like I say, I don't think are much worth to --

THE COURT: Well, you have more exhibits you want to offer?

MR. CALVERT: No. These were the ones that I had made up prior to coming here today, but these all relate to what things against Ira Sandron and so --

THE COURT: I don't think those are going to be --

MR. CALVERT: Okay. So --

THE COURT: According to my ruling, I don't think those have any bearing --

MR. CALVERT: Okay. That's fine.

THE COURT: -- on what we're doing.

MR. CALVERT: Right. I don't think so, either.

THE COURT: All right. Great. Well, let's go

forward. All right. NLRB, 10 minutes.

MR. OWENS: Your Honor, thank you. Given Your Honor's knowledge of the case, I'm going to be as surgical as possible --

THE COURT: Fantastic.

MR. OWENS: -- on the issues. With respect to the 727(a)(3), nothing we heard today has really changed our position on the matter. Mr. Calvert's largest asset was his loans that he made to his son, Kevin. So here, we're referring to the promissory notes. And I think, when Mr. Calvert was on the stand, he testified figuring out how much he owed, his son owed him, was a fiasco. And Your Honor, we agree. We've been given different numbers during the 2004 examinations regarding the amount that he loaned his son.

And we have received nothing except his testimony regarding the character of these loans. The NLRB would agree that to figure out exactly how much he loaned his son and the precise character of these loans would be very difficult if not impossible without having the actual loan documents. And we would disagree that the copies of the unsigned documents would be sufficient, given case law that clearly reflects that creditors are not to take a debtor at his word regarding documented evidence that hadn't been produced.

With respect to the 727(a)(4), the government has alleged that Mr. Calvert's made false statements with the

intent to defraud his creditors. Mr. Calvert concedes that these were omitted from his schedules and his bankruptcy petition, that he omitted certain items consciously, that they weren't a mistake, that he failed to disclose, one, his wife's bank account as being an account held in his benefit, but also that he failed to disclose business income.

And he provides his explanation for why those things were consciously omitted. With regard to the bank account, Mr. Calvert doesn't dispute that, that was a joint account held in the name of his wife. He refers to the account as "our account" and conceded that, that was the account that they used to write checks and conduct family business. With regard to his business income, if we look at the invoices that he issued, it pretty clearly demonstrates that Mr. Calvert -- and he conceded that he was performing work and he was being paid for that work, including the invoice that he issued merely less than two weeks prior to filing his bankruptcy petition, where he identifies himself as the construction manager on the project.

In both of these items, the account and his business income were omitted from his schedules and his petitions. With respect to the intent, I would direct Your Honor to a couple of issues here. First, there's really no explanation or a legitimate explanation for why Mr. Calvert would omit the $10,000 he earned 10 days prior to filing his petition from his

petition. It's reflected nowhere in his schedules or his bankruptcy petition. Moreover, when Mr. Calvert was given the -- was questioned by the Trustee, Mr. Petr, regarding the amount of income, he did not disclose that income to Mr. Petr.

When he was further not forthright with NLRB during 2004 examinations regarding his income and only when confronted with these facts did Mr. Calvert actually concede that he had this business income. And we would also direct Your Honor to the tax return where Mr. Calvert actually did claim his income during the tax year, the same tax year where he failed to claim the income on his bankruptcy petition.

Turning now to the 523 claim, Your Honor, I would like to point out that, under our statute, under Section 7 of the NLRA, employees have an array of rights, not only to form a labor union, but they also have a right to refrain from forming a labor union. They have a right to have an election under certain circumstances and decide whether they want a labor union. The NLRA protects employees from discrimination just like other statutes protect employees from discrimination based on race, or gender, or other reasons.

So in this case, the Board has found that Mr. Calvert has laid off his employees and injured his employees by violating their rights under our statute, in fact violating their Section 7 rights. If we look at the code, what's required here is a showing that Mr. Calvert -- with respect to

the willfulness of his conduct, that his motive was either to inflict an injury or that he was substantially certain that the injury would result.

What we've demonstrated here today is that Mr. Calvert had a really sound understanding of what his employees' rights were under our statute. He understood that his rank-and-file employees had a right to exercise their right to vote for whether they wanted to be represented or not represented by a labor union at ELC Electric. He understood that some employees didn't have those same rights.

There were some people that worked under his projects that didn't have the same rights. He testified to his understanding that temp employees, for example, specifically employees that were employed by these labor providers, didn't enjoy the same benefits under our statute that is the NLRA as did his rank-and-file employees. Nor did he -- and he also testified his understanding -- his managers and supervisors didn't have that same right.

So when Mr. Calvert laid off his employees, not only was he severing these employees -- his employment relationship with these employees, he was severing their access to certain benefits, not only their benefit of having holiday pay or vacation pay, he was actually severing their rights that they enjoyed under Section 7 of our statute.

And that would be the right to a union election, or

to organize a labor union, or to refrain from engaging in that conduct, or to vote not to have a labor union. And Mr. Calvert has testified this morning that he understood that employees had those rights and that those rights would not exist at the time that he laid these employees off. And it is the government's position, Plaintiff's position, that Mr. Calvert was substantially certain that, by severing these employees, employment relationship with the employees, that they would suffer injury to their Section 7 rights. Thanks, Your Honor.

THE COURT: You're welcome. Thank you very much. Mr. Calvert?

MR. CALVERT: Yes, Your Honor. First of all, to the loans to my son, Kevin Calvert, I provided the NLRB with all the information that they keep referring to. I held nothing back. But when I gave them all of these documents where I went through and I tried to find the correct amount between what we had loaned my son and what I had loaned my son, and what my daughter -- or what my wife had loaned my son.

As you know from my testimony, it was extremely difficult to go through all that with everything combined, and try to pick out, and try to pick apart what part of the money coming in from my account to what part of the money coming in from my wife's account, and they all being put together, how much my wife loaned my son and how much I loaned my son, which, now, the NLRB also had, every document from Edward Jones they

asked for.

And I saved every document from the pension plan. They had the opportunity to go through and to sort out what number that they thought it might be. And of course, they've never done any of this to my knowledge. As for the business income that they keep referring to, as I've referred to in my testimony, those two small jobs that I did should not be constructed as a business. I didn't have none of the things and didn't do other things required to do a business.

It would be like me having a yard sale twice a year and claiming that I was in the yard sale business. On my tax return, I listed the money that I had received properly, the money that I got prior to the filing of the bankruptcy. It went into my wife's account and went out to pay bills just as fast as it went in. There was nothing saved or anything else. It was money that we needed to pay our bills. Now, they may want to play on the words of saying I used our instead of me or mine, but I've been married 51 years and about everything I have is ours.

The NLRB talks about the rights of the union or the people to organize. It was not ever my intent not to do this. And for the NLRB to say it was my intent is nothing but speculation on their part and something that they have made up to fit their agenda. There's no proof. There's no anything other than what I've given. And I think that I've given

substantial testimony and substantial reasons stating why I did those things.

It was to avoid audits of the Indiana Department of Labor and, in doing so, I could save a lot of money for the company. The decisions I made were absolutely business decisions for the company. I also did not want to go out of business. I have letters where I wrote to my employees back in 2004, even suggesting that hopefully 2005 would be a better year and that we've had to trim things. So the NLRB's assertion of me doing all these things to hurt my employees is just not true. One last thing I would say, Your Honor, whether it be appropriate or not appropriate, to the NLRB, this is a game. It's a game of winning and losing.

THE COURT: Yeah. That is inappropriate.

MR. CALVERT: Okay.

THE COURT: Thank you, Mr. Calvert. Let's not go there.

MR. CALVERT: I'm done then, Your Honor.

THE COURT: All right. Let's not go there. I thank both sides. It was presented very well. I'm a little bit torn because I know parties want to know as quickly as possible where the Court's going to come out. But on the other hand, I want to think about a couple of issues, not so much as where I'm going to come out, but to make sure that I've got my ruling straight.

I will tell you, on the 523(a)(6), as I've told you in the ruling on the motion for summary judgment -- and I can't remember the decision that we cited, but I think a couple of courts correctly found that there is not an intent element with respect to a violation of Section 7. So something more has to be shown. And I don't believe that the NLRB has shown it. I do not believe that you've shown it.

You did a good job presenting the case, but I don't believe that you've shown it. With respect to the 727 issues, with regard to the failure to keep records, Mr. Calvert's testimony is, he lost the file with regard to the promissory notes. I have spent, I don't know, a long, long time, over 30 years as a commercial lawyer. And I can tell you that, in the Uniform Commercial Code, in Article III of the Uniform Commercial Code, there is a provision dealing with what happens when people who are in the commercial lending business lose promissory notes.

So it's not unheard of that somebody would lose a promissory note. And there is in fact a remedy specified for when that circumstance occurs. Section 727 as it pertains to maintenance of records is not no fault. I don't believe that -- and I'm going to do a little bit more looking, but I don't believe that that's been made out. Moreover, I do not believe that a showing has been made that Mr. Calvert intended to defraud creditors with regard to the completion of the

schedules, particularly given all of the discovery that's gone on here.

So I'm going to get you a ruling as promptly as I can, although I want it to be thorough. That's why I overcame my natural inclination. My natural inclination was to say to you all, "Thank you so much. I'll take it under advisement." But I don't want to leave you stewing over how I'm going to come out. I'm going to rule in favor of Mr. Calvert. And it's not because the NLRB did a bad job. They did a very good job in presentation of the evidence here.

I just don't think it met its burden of showing of the intent element under 523(a)(6). And I don't believe it met its burden with regard to the intent element with regard to false testimony. And I don't believe that it showed anything with regard to the loss of the file and the promissory notes, given all the information that was provided. That makes not the basis for denial of discharge with respect to that. I also note that I'm going to go back and go look, but it's my understanding that the Trustee has settled with Mr. Calvert's son and has represented to the Court that the son -- what was entered into was in the best interests of the estate. So it's hard for me to see where the prejudice comes from with regard to the loss of the note file. But I will get you a ruling, but I didn't want to leave you hanging. Thank you so much for the presentations. We're adjourned.

(Whereupon, at 1:50 p.m., the hearing in the above-entitled matter concluded.)

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CERTIFICATE

I, ERICA L. INGRAM, a certified electronic transcriber, certify that the foregoing is a correct transcript, to the best of the transcriber's ability, from the official electronic sound recording of the proceedings in the above-entitled matter.

/s/ Erica L. Ingram Date: November 4, 2015

Erica L. Ingram - AAERT CET**D-521

J&J COURT TRANSCRIBERS, INC.

E.L.C. Electric, Inc. *and* International Brotherhood of Electrical Workers, AFL–CIO and All Trades Staffing, Inc.

E.L.C. Electric, Inc. *and* International Brotherhood of Electrical Workers, Local Union No. 481, a/w International Brotherhood of Electrical Workers, AFL–CIO. Cases 25–CA–28270–1, 25–CA–28270–2, 25–CA–28283–1 Amended, 25–CA–28283–2 Amended, 25–CA–28283–4 Amended, 25–CA–28398–1 Amended, 25–CA–28567, 25–CA–28582, 25–CA–28637 Amended, 25–CA–28397–1 Amended, 25–CA–28406, 25–CA–28532 Amended, and 25–RC–10131

July 29, 2005

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

An election was held September 26, 2002,[1] in a unit of electricians employed by the Respondent, E.L.C. Electric, Inc.[2] The Union lost the election. It filed objections, alleging that the Respondent interfered with the election by ordering employees not to discuss the Union, providing pay raises to two employees during the critical period, offering to improve the employees' health insurance, and failing to post the Board election notices at its individual jobsites. Pursuant to charges filed by the Union, the General Counsel issued a complaint, alleging that the Respondent had violated Section 8(a)(1) and (3) of the Act in numerous respects prior to and after the election.

On April 7, 2004, Administrative Law Judge Ira Sandron issued the attached decision. The judge sustained the Union's objections regarding the order not to discuss the Union, pay raises, and failure to post election notices, but overruled the objection concerning the alleged promise of benefits. He also found that the Respondent committed many, but not all, of the alleged 8(a)(1) and (3) violations. The Respondent filed exceptions and supporting argument, and the General Counsel filed an answering brief. The Union filed cross-exceptions, a supporting brief, and an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings[3] and conclusions as modified, to adopt the recommended Order as modified, and to adopt the judge's recommendation that the election be set aside and a new election held.[4]

For the reasons discussed below, we agree with the judge that the pay raises were objectionable. Unlike the judge, however, we also find that the Respondent interfered with the election and violated Section 8(a)(1) by impliedly promising to improve health insurance benefits.

[1] Unless otherwise specified, all dates refer to 2002.

[2] The election was conducted pursuant to a Stipulated Election Agreement in the following appropriate unit:

> All Journeyman Electricians, Apprentice Electricians, Service Technicians, and Electricians Helpers engaged in electrical construction work in Bartholomew, Boone, Decatur, Hamilton, Hancock, Hendricks, Jennings, Johnson, Madison, Marion, Montgomery, Morgan, Putnam, Ripley, Rush and Shelby Counties employed by the Respondent; BUT EXCLUDING all managers, all warehouse employees, all delivery drivers, all sound and communication workers, all telecommunications technicians, all trenching equipment operators, all part-time help, all office clerical employees, all professional employees, and all guards and supervisors as defined in the Act.

The tally of ballots shows 11 for and 13 against the Petitioner with 6 challenged ballots. The judge sustained all six challenges, and no party has excepted. Accordingly, the challenged ballots cannot affect the results of the election.

[3] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all of the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

For the reasons fully set forth in the judge's decision, we affirm his findings that the Respondent violated Sec. 8(a)(1) by telling an employee that it would try to keep its "loyal employees" in the face of upcoming layoffs and by on two occasions telling an applicant for employment that the Union was responsible for his not being able to obtain regular employment. We also affirm the judge's finding that the Respondent violated Sec. 8(a)(3) by laying off three employees and then the rest of the bargaining unit because of their union activities.

There are no exceptions to the judge's dismissal of allegations that the Respondent violated Sec. 8(a)(1) by telling an employee to complete a health insurance form, by creating an impression of surveillance, by its work assignment of union activists, and by interrogating an employee about his union affiliation; and violated Sec. 8(a)(3) by taking away an employee's gang box key and telling him to complete an insurance form, and denying reassignment of a laid-off employee to other work. There are no exceptions to the judge's sustaining of the Union's objection regarding the order not to discuss the Union. Nor are there exceptions to the judge's findings that the Respondent violated Sec. 8(a)(1) by promulgating and maintaining a rule against discussing the Union on worktime, threatening a union activist with physical violence and other retaliation, isolating two union activists, soliciting a union activist to quit his employment, interrogating employees Adair and Grunde about the Union, and telling an employee that it was laying off employees because of problems with the Union; and violated Sec. 8(a)(3) by assigning two union activists more onerous work and isolating them and issuing a written warning to the Union's election observer immediately after the election.

[4] We have added a Direction of Second Election to the judge's Order. [Omitted from publication.]

Implied Promise of Benefits

In mid-September, the Respondent's vice president for operations, Kevin Passman, and its general superintendent, Mike Swalley, addressed the employees at a mandatory meeting at one of its jobsites. During this meeting, they encouraged the employees not to vote for representation by the Union. After addressing the employees, Passman called for questions, and one employee asked if the Respondent was going to try to get better health insurance. Passman replied that the Respondent was actively seeking to improve employee health insurance benefits by the end of the year, but made no explicit promise of improvements.

In overruling the Union's objection, the judge cited *LRM Packaging*, 308 NLRB 829 (1992). He reasoned that Passman's comment did not constitute a promise of benefits because it did not expressly or implicitly associate an increase in the employees' benefits with their rejection of the Union in the upcoming election. He noted that the subject of health insurance was not addressed in Passman's presentation and was only raised by the employee question which Passman then answered. The judge also noted that the Respondent was required to change its insurance carrier by January 1, 2003, as a result of the settlement of a lawsuit. Contrary to the judge and our dissenting colleague, we agree with the Union that Passman's statement was an implied promise of improved benefits to the Respondent's employees.[5]

The Board will infer that benefits granted or promised during the "critical period"[6] prior to a representation election interfere with the employees' free choice. The employer may rebut this inference by providing a persuasive explanation, other than the pending election, for the timing of the grant or promise of benefits. *Dyncorp*, 343 NLRB No. 124, slip op. at 2 (2004); *B & D Plastics, Inc*., 302 NLRB 245 (1991). As the Supreme Court has aptly put it, "Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged." *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964). An employer's promise or grant of benefits during an election campaign also violates Section 8(a)(1). Id.; *Dyncorp*, supra, 343 NLRB No. 124, slip op. at 2.[7] To be objectionable and unlawful, a promise of benefits need not be explicit. See, e.g., *County Window Cleaning Co*., 328 NLRB 190, 196 (1999).

Applying these principles, we find that Passman's statement that the Respondent was actively seeking to improve employee health insurance benefits was unlawful and objectionable. First, the statement was an implied promise to improve benefits. *County Window Cleaning Co*., supra, 328 NLRB at 196 (employer's statement, inter alia, that "he was looking into insurance for the employees" constitutes an implied promise of benefits in context). Second, Passman made the statement during the critical period. Third, contrary to the judge, we find that the employees would reasonably have interpreted Passman's remarks as predicating the improvement of their health benefits on their rejection of union representation. Passman made the statement at the end of an antiunion speech at a mandatory employee meeting, and in the context of numerous other unfair labor practices. Passman did not refer in his speech to the settlement agreement that compelled the Respondent to change insurance carriers; indeed, the Respondent had never before mentioned the prospect of new health insurance benefits to its employees. Thus, the possibility of improved health benefits was broached entirely in the context of the Respondent's opposition to the Union. Consequently, the employees would reasonably tie the prospect of improved health benefits not to a settlement agreement of which they had no knowledge, but to rejecting the Union, which the Respondent was urging them to do then and there. Finally, the Respondent has offered no plausible reason for making this announcement during the critical period. *B & D Plastics*, supra, 302 NLRB at 245.[8]

We find *LRM Packaging,* supra, on which the judge relied, distinguishable.[9] There, the Board found that the

[5] The Union also excepted to the judge's failure to find that this statement violated Sec. 8(a)(1).

[6] The critical period commences at the filing of the representation petition and extends through the election. *Ideal Electric Mfg. Co.*, 134 NLRB 1275 (1961). The petition in this case was filed on July 29, and the election was held on September 26.

[7] The Board applies the same test to analyze promises and grants of benefits in both representation and unfair labor practice cases. *Niblock Excavating, Inc.*, 337 NLRB 53, 53–54 fn. 5 (2001), enfd. 59 Fed.Appx. 882 (7th Cir. 2003).

[8] We also disagree with the dissent's conclusion that the employer's statement was an "innocent casual remark" merely because it was given as a response to an employee's question. The fact that the statement in question was made in response to an employee question does not render it proper. The Board has held that: "It is clear that, under Section 8(c), an employer may lawfully furnish accurate information, especially in response to employees' questions, *if it does so without making threats or promises of benefits*." *Lee Lumber & Building Material*, 306 NLRB 408, 409 (1992) (emphasis added), remanded on other grounds 117 F.3d 1454 (D.C. Cir. 1997). Accordingly, an employer is entitled to answer a question raised by an employee, but cannot do so in a way that indicates it would do more for employees if they remained unrepresented. *Angelica Corp.*, 276 NLRB 617, 623 (1985).

[9] We disagree with the dissent's attempt to distinguish this case from *County Window*, supra. As discussed below, the delivery of this remark in the course of an antiunion speech given during the critical period

employer did not violate Section 8(a)(1) when its president stated at a preelection meeting that he would give employees a medical plan and a wage raise when the employer could afford it. The Board found that the statement only expressed the employer's hope that it would be in a position at some unspecified time in the future to improve the employees' working conditions. Significantly, the employer had made a similar promise to employees, and actually set into motion a grant of benefits, months *before* the union organizing campaign began. Under those circumstances, the promised improvements in *LRM Packaging* were not associated with the employees' rejection of the union. 308 NLRB at 829. Here, in contrast, the Respondent had not promised, let alone "set in motion," an improvement in health insurance benefits before the onset of the union organizing campaign. Indeed, the Respondent did not even begin to seek price quotes for a new plan until a month after Passman made his remarks.

Accordingly, we reverse the judge and find that Passman's statement constituted an unlawful promise of benefits that interfered with the employees' free choice in the election. We also find that the statement violated Section 8(a)(1) of the Act.

Grant of Pay Raises

The judge found that the Respondent granted pay raises to employees Mikalis Grunde and DeMarco Thacker shortly before the election in order to influence their votes, and that the pay increases constituted an additional ground for setting aside the election. For the reasons discussed below, we agree with the judge.

The Respondent hired Grunde and Thacker as apprentices and encouraged them to enroll in an apprenticeship program, which they did in June and July. (Classes in the program started around August 9.) On September 11 and 18, respectively, the Respondent notified Grunde and Thacker that they would receive a wage increase to $11 per hour retroactive to September 9. Because the pay raises were granted during the critical period, an inference arises that they were coercive. *B & D Plastics*, supra, 302 NLRB at 245.

The burden thus shifted to the Respondent to come forward with a persuasive explanation, other than the pending election, for the timing of its action. Id. The judge found that the Respondent had failed to carry that burden. He observed that the Respondent's policy handbook did not indicate that an employee would receive a pay raise based on joining an apprenticeship program, and that the Respondent submitted no written evidence that it had a policy of giving pay raises for this reason or that it had done so in the past. Based on these circumstances, as well as the Respondent's numerous unfair labor practices, the judge concluded that the Respondent had not rebutted the inference that pay raises granted during the critical period were intended to influence the employees' votes.

In exceptions, the Respondent argues that Grunde testified that he was told at his job interview that he would receive a pay increase if he participated in the apprenticeship program. This testimony was consistent with the testimony of General Superintendent Mike Swalley that the Respondent routinely gave such increases when employees entered apprenticeship.

We reject this argument. To begin with, even if Grunde was promised a raise upon entering the apprenticeship program, there is no evidence that any such promise was made to Thacker. Indeed, Thacker testified that he did not recall being told by the Respondent's representatives that he would receive a raise once he enrolled in the apprenticeship program and that, to his knowledge, he was not scheduled to receive one.

Moreover, there is no record evidence to explain why the Respondent granted the raises when it did, i.e., well after Grunde and Thacker started the apprenticeship program and right before the election. Grunde was indentured on July 9, and Thacker on July 29, and neither received a raise at that time. Apprenticeship classes commenced around August 9, yet neither employee received a raise then either. Not until mid-September—only a week or two before the September 26 election—did the Respondent inform Grunde and Thacker that their pay was being increased. There is no evidence of any event other than the pending election that might have triggered the announcement at that time. In sum, the Respondent's rebuttal evidence does not explain the long delay between the employees' enrollment in the apprenticeship program and the conferral of the pay raises shortly before the election.[10]

Given the Respondent's failure to explain the timing of the pay raises, the absence of any written policy or any written evidence of a practice of raising the wages of apprentices, and the Respondent's commission of numerous unfair labor practices in September, we agree with the judge that the Respondent has failed to rebut the inference that the reason for granting the pay raises to Grunde and Thacker during the critical period was to influence their votes. Accordingly, the pay increases

reasonably would tend to cause the employees to associate improved health benefits with the rejection of the union.

[10] Further, the Respondent gave the raises retroactive effect only to early September—and not to the date of enrollment or the start of classes, as the logic of the Respondent's explanation would seem to dictate.

constitute objectionable behavior requiring that the election be set aside.[11]

Other Allegedly Objectionable Conduct

The Union notes that the Respondent told employees they could not discuss the Union on company time, that the judge found this to be objectionable conduct, and that the Respondent did not except to this finding. In the absence of exceptions to the judge's finding of objectionable conduct, we adopt the finding pro forma. The Union suggests that, in light of this unexcepted-to finding of objectionable conduct, the Board should overturn the election on the basis of this objectionable conduct without considering the other allegations of objectionable conduct. We do not adopt the Union's suggestion and rely upon all of the objectionable conduct in overturning the election.

Finally, as noted above, the judge found that the Respondent's interrogation of employee Ben Adair violated Section 8(a)(1) and there were no exceptions to this finding. The Union's objections did not refer to the interrogation and the judge did not address the issue of whether the interrogation constituted objectionable conduct. The Union here contends that the interrogation fell within the "catchall" language ("[b]y these and other acts") of its final objection and that the Board should set the election aside on this basis as well. Although administrative law judges and regional directors have the authority to set aside elections based on conduct other than that specified in objections, we find that the circumstances of this case do not warrant this action. Since we are already relying on three other grounds in setting aside this election, we find it unnecessary to reach beyond the specific conduct cited in the Union's objections.[12]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, E.L.C. Electric, Inc., Indianapolis, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 1(p) and reletter the subsequent paragraph:

"(p) Promising its employees improved health benefits in order to persuade them to abandon their support for the Union."

2. Substitute the following for the final paragraph:

"IT IS FURTHER ORDERED that Case 25–RC–10131 is severed from the consolidated complaint cases, that the election conducted therein is set aside, and that Case 25–RC–10131 is remanded to the Regional Director for Region 25 to conduct a second election." [Direction of Second Election omitted from publication.]

3. Substitute the attached notice for that of the administrative law judge.

MEMBER SCHAUMBER, dissenting in part.

Unlike my colleagues, I agree with the judge and would find that Kevin Passman's mid-September answer to an employee's question about health insurance was neither objectionable nor unlawful. As the judge pointed out, the complaint did not allege that anything Passman said in his prepared comments about the election was unlawful, and the Union did not contend that those comments interfered with the election in any way. Nor, in response to the employee's question, did Passman promise health insurance benefits. He said only that the Respondent was actively seeking to improve those benefits by the end of the year. Thus, Passman, after making some prepared comments during which he never mentioned benefits, responded spontaneously and truthfully to an employee's question, without making any promises or threats and without making any reference to the Union or to the employee's attitude toward it. In these circumstances, I regard Passman's response to the employee's question as an uncoercive; indeed, an innocent casual remark.

County Window Cleaning Co., supra, relied on by my colleagues, is factually quite distinguishable. There, Anthony Silvestri, the respondent's president, sole shareholder, and chief operating officer, had a conversation with three employees. At the time, Silvestri had unlawfully terminated one of them the day before and the other two immediately quit in protest. The three reported for work the next day on the union's instructions and asked Silvestri if he had any work for them. Silvestri said he did, but it would have to be without the union because he could not afford to join the union. The employees responded that they wanted to continue with the union to get better benefits. In response, Silvestri said that if it as just a few dollars more or 50 cents per hour, they could sit down and talk adding that he was also looking into insurance for the employees. He then urged them to think about their decision "really well." In addition to unlawfully conditioning employment of the three employees upon their abandonment of the union, the re-

[11] Although only two employees were directly affected by the pay raises, the Union lost the election by only two votes. Clearly, the Respondent's action could have affected the election results.

[12] The Respondent excepts to the judge's finding that its failure to properly post the Board's election notices at individual jobsites justified setting aside the election. We also find it unnecessary to rely on the judge's finding in this regard because we are already setting aside the election on other grounds. Chairman Battista finds that the evidence does not prove the Respondent failed to properly post the election notice.

spondent was found to have unlawfully promised the employees benefits if they withdrew their support for the union. Passman's response to the employee's question in the case under review is hardly comparable to the clear and specific implied promise of benefits made by Silvestri. I would, accordingly, dismiss the allegation.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT promulgate and maintain a rule prohibiting employees from discussing or soliciting on behalf of the International Brotherhood of Electrical Workers, Local Union No. 481 (the Union).

WE WILL NOT suggest physical violence against employees because they support the Union.

WE WILL NOT denigrate employees because they support the Union.

WE WILL NOT instruct employees not to discuss the Union with other employees.

WE WILL NOT isolate employees from other employees because of their support for the Union.

WE WILL NOT solicit employees to quit employment because they support the Union.

WE WILL NOT create the impression among employees that their union activities are under surveillance.

WE WILL NOT interrogate employees concerning their union activities and sympathies.

WE WILL NOT promise our employees improved health benefits in order to persuade them to abandon their support for the Union.

WE WILL NOT tell employees they will be laid off because of their union activities.

WE WILL NOT tell prospective employees they cannot be hired because our employees engaged in union activity.

WE WILL NOT tell employees they are being laid off and will be required to work through a labor provider because they engaged in union activity.

WE WILL NOT assign more onerous working conditions to employees because of their union activities.

WE WILL NOT issue written warnings to employees because of their union activities.

WE WILL NOT lay off employees because of their union activities.

WE WILL NOT require employees to apply for employment through a labor provider.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Mikalis Grunde, Bruce Sanderson, Jonathan Trinosky, and those employees laid off on March 14, 2003, full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Mikalis Grunde, Bruce Sanderson, Jonathan Trinosky, and those employees laid off on March 14, 2003, whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful layoffs of Mikalis Grunde, Bruce Sanderson, Jonathan Trinosky, and those employees laid off on March 14, 2003, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and the layoffs will not be used in any way against them.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful written warning issued to DeMarco Thacker on September 26, 2002, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the warning will not be used in any way against him.

WE WILL reinstitute our practice of employing electrical employees as it existed prior to March 14, 2003.

E.L.C. ELECTRIC, INC.

Derek A. Johnson and *Rebekah Ramirez, Esqs.,* for the General Counsel.

Michael L. Einterz, Esq. (Einterz & Einterz), of Indianapolis, Indiana, for the Respondent/Employer.

Neil E. Gath, Esq. (Fillenwarth, Dennerline, Groth, & Towe), of Indianapolis, Indiana, for the Charging Party/Petitioner.

DECISION

STATEMENT OF THE CASE

IRA SANDRON, Administrative Law Judge. This matter arises out of the following related unfair labor practice and representation proceedings.

1. An order consolidating cases, consolidated complaint and notice of hearing issued on June 19, 2003,[1] and an amendment to consolidated complaint issued on August 8 (collectively, the complaint), against E.L.C. Electric, Inc. (ELC or the Respondent), based on charges filed by International Brotherhood of Electrical Workers, AFL–CIO and International Brotherhood of Electrical Workers, Local Union No. 481 (collectively, the Union).

2. A report on challenged ballots and objections, order consolidating cases, order directing hearing, and notice of hearing issued on December 23, 2002, following a petition filed on July 29 and an election held on September 26, in the following unit of employees stipulated to be appropriate: journeyman electricians, apprentice electricians, service technicians and electrical helpers engaged in electrical construction work in [named Indiana counties], excluding managers, warehouse employees, delivery drivers, sound and communication workers, telecommunications technicians, trenching equipment operators, part-time help, office clerical employees, professional employees, and guards and supervisors as defined in the National Labor Relations Act (the Act).

Pursuant to notice, I conducted a trial in Indianapolis, Indiana, on August 20 to 22, and November 4 and 5, 2003, during which all parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. I have duly considered the helpful posthearing briefs that were filed.[2]

Issues

1. Whether prior to the election, commencing in July 2002, ELC committed various independent violations of Section 8(a)(1) of the Act and discriminated against employees Jason Dunn, Brad Krebbs, and Corey Leineweber in assignments or conditions of employment, in violation of Section 8(a)(3) and (1).

2. Whether Dunn, Krebbs, Leineweber, George Nichols, and Robert Nichols in July 2002 went out on an unfair labor practice strike and should have their challenged ballots counted.

3. Whether ELC's unfair labor practices and other conduct warrant setting aside the election. The Union argues that, in addition to conduct alleged in the complaint, ELC gave pay raises to Mikalis Grunde and DeMarco Thacker in September 2002, and failed to properly post election notices at jobsites where employees worked.

4. Whether following the election, ELC engaged in further independent violations of Section 8(a)(1), and violated Section 8(a)(3) and (1) by issuing Thacker warnings and not assigning him work in September 2002, and by laying off Bruce Sanderson on January 9; Jonathan Trinosky on February 5; and Grunde on February 17, 2003.

5. Whether ELC violated Section 8(a)(3) and (1) by laying off all remaining electrical employees on March 14, 2003, and the following week, utilizing them as employees of labor providers to perform unit work (the transition).

Facts

Based on the entire record, including the pleadings, testimony of witnesses and my observations of their demeanor, documents, and stipulations of the parties, I make the following findings of fact.

Witnesses included:

1. All of the above-named employees, with the exception of George Nichols; and Benjamin Adair, an employee of ELC until March 14 and then of All Trades Staffing, Inc. (All Trades).

2. Steven Dunbar, union organizer.

3. Greg Maier, vice president of All Trades; Stephen Wise, president of National Construction Workforce (National); and Jerry Tucker, an employee of All Trades assigned to work for ELC both before and after the transition.

4. Edward Calvert, ELC's president and sole owner; Kevin Passman, vice president of operations and overseer of day-to-day operations, who is in charge of purchasing materials and estimating jobs; Mike Swalley, general superintendent, who is in charge of field activities, including labor, and has had primary responsibility for handling layoffs; and Supervisors James Corbly and Walter Freese.

The title of jobsite supervisors has varied, but their basic duties and responsibilities have remained the same at all times material. For ease of reference, the term "supervisor," will be used throughout this decision. The Respondent concedes their status as agents of ELC and statutory supervisors within the meaning of Section 2(11) of the Act.[3]

Supervisor Christine Patterson a/k/a Christine Rossittis was not called to testify by the Respondent, and no explanation was offered for her nonappearance. Therefore, I draw an adverse inference from its failure to call her as a witness. In any event, statements attributed to her by various witnesses of the General Counsel went unrebutted. The Union challenged her ballot at the election. Inasmuch as the Respondent now agrees that she has been a statutory supervisor at all times relevant,[4] and the record reflects such status, I sustain the challenge to her ballot.

On the other hand, neither the General Counsel nor the Union called George Nichols, who was the only witness who could provide direct evidence of the circumstances surrounding his termination of employment at ELC. In the absence of such testimony, and the Respondent's concomitant lack of opportunity to cross-examine him, I decline to find that he engaged in a strike.

ELC, a corporation, with an office and place of business in Indianapolis, Indiana, is engaged as an electrical contractor in

[1] Because the operative dates occurred about equally in 2002 and 2003, specific mention of the year will be omitted when made clear from the context.

[2] The General Counsel's unopposed motion to correct transcript (GC Br. at p. 2) is granted.

[3] Tr. 33.

[4] Tr. 892.

the construction industry and is a member of the Associated Building Contractors of Indiana (ABC). Its status as an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act is not in dispute, nor is the Union's status as a labor organization within the meaning of Section 2(5) of the Act.

I. EVENTS PRIOR TO THE ELECTION

A. The Union's Organizational Efforts

Prior to the Union's organizing campaign, ELC became embroiled in a dispute with the Indiana Department of Labor, for allegedly not paying proper fringe benefits on common wage projects, and Calvert evidently placed blame on the Union. Thus, Calvert sent a letter dated June 10, 2002, to all employees,[5] decrying the department "for their vicious, defamatory, and harmful actions taken against our company," and accusing the department of being "pushed by their friends at IBEW." The closing paragraph concluded:

> They are trying to force us out of business, causing you to lose your job. If they succeed against ELC, they will then move on to the next non-union contractor and begin again with the same tactics. Maybe you will be working for this company then. Where does it end? *IT ENDS NOW*! Stand with me and fight against these corrupt and evil people who want to run our lives. [Emphasis in original.]

Dunbar began organizing efforts among ELC's employees in July 2002. On July 8, Krebbs agreed to be chairman of the organizing committee, and Dunbar sent a letter to the Respondent by telefax and certified mail.[6] Krebbs received a shirt with the union logo,[7] which he wore the following morning to work. From July 11 through 16 or 17, Dunbar engaged in passing out handbills and other literature to employees at the Wal-Mart super store, Columbus, Indiana (Wal-Mart). A number of employees subsequently called him in response.

On about July 15, Dunbar met with Dunn and Leineweber, who agreed to be on the Union's organizing committee. Dunbar notified ELC of this by a letter dated July 15 as to Dunn and July 17 as to Leineweber, each sent by both telefax and certified mail.[8]

B. Alleged Violations of Section 8(a)(1) and (3) Prior to the Strike

The General Counsel contends that on about July 8, 2002, the Respondent changed the working conditions of Krebbs by taking away his assigned key, and on about July 8 and 10, assigned him more onerous working conditions, to wit, demanding he turn in health insurance papers and assigning him work that he could not complete in the time given. These allegations involve Swalley and Corbly.

Krebbs was tentative when it came to the exact dates of certain conversations with Swalley, and portions of his testimony were contradicted by documentary evidence. Thus, although Krebbs testified that he had one conversation with Swalley regarding submission of health insurance forms and that it occurred on either July 9 or 10, General Counsel's Exhibit 38 corroborates Swalley's testimony that they had two conversations on the matter; the first on July 8, and the second on July 9, and I so find. I further note that although Krebbs testified that he had never been asked to fill out insurance forms prior to July, General Counsel's Exhibit 37 is a letter to Krebbs dated June 5 from Darlene Van Treese, administrative assistant, in which she advised Krebbs that he would become eligible for medical insurance on July 18, and needed to return the application by June 21.

Corbly answered questions directly and struck me as generally credible. Swalley appeared ill at ease and, during portions of his testimony, did not give direct answers. Thus, as with Krebbs, Swalley was only partially credible.

It is further alleged that on about July 17 and 18, the Respondent, through Patterson, assigned more onerous working conditions to Dunn and Leineweber, by isolating them from other employees and assigning them cleanup work. Dunn and Leineweber appeared candid, and I credit their uncontroverted testimony about her words and actions, and their testimony in general.

1. Krebbs

Krebbs, a journeyman electrician, first worked for ELC as a temporary employee through National. When he became a permanent employee in January 2002, his first assignment was at the Sunman Elementary School Project (Sunman), where Corbly was the supervisor.

The circumstances surrounding Krebbs getting the key on March 1, 2002, and being asked to return it on July 8, 2002,[9] are generally not disputed. When Corbly instituted a night shift at Sunman, he assigned two employees, including Krebbs. Because Krebbs had been on the job longer, Corbly put him in charge of the night shift, informed him that would be the supervisor of the night crew, and gave him a key to the ELC lockboxes, in which tools and supplies were kept. The key also was used to enter the jobsite trailer.

The night shift lasted only 1 week, after which Krebbs was switched to day shift as a regular journeyman electrician. He continued to use the key to access tools and supplies. Corbly did not immediately ask for its return because it was helpful for Krebbs to have it when Corbly was absent from the site.

On July 8, Krebbs saw Swalley at Sunman. The first thing Swalley said was that Krebbs needed to return the lockbox key. Krebbs asked why, and Swalley responded that he (Krebbs) was not allowed to have it anymore. Both Corbly and Swalley testified that Krebbs was asked to give the key back because another employee needed it; specifically, Trinosky, who worked in the kitchen area at Sunman with another employee, was in charge of that area, and was responsible for locking up tools.

[5] GC Exh. 2.

[6] GC Exh. 24. The fax was received on the morning of July 8; the certified letter on July 9. See GC Exhs. 24(b) and (c).

[7] See CP Exhs. 15(a) and (b).

[8] GC Exhs. 25 and 26, respectively. Both letters were received by mail on July 17, whereas the fax for Dunn was received on July 16, and the fax for Leineweber on July 17. See GC Exhs. 25(b) and (c) and 26(b) and (c).

[9] The dates are established by GC Exh. 36, Krebbs' inventory list.

Although Krebbs testified that taking away his key aggravated him "a little bit," because he thought it was discriminatory and they were taking away his responsibility, the only impact was that it "slowed us down a little bit . . . [A]s far as me, it didn't affect my work at all."[10]

I credit Swalley's testimony concerning the circumstances surrounding his insistence that Krebbs fill out a health insurance election form. ELC offered health insurance benefits to its employees after a waiting period, and employees were then required to fill out forms either accepting or declining such insurance. Van Treese asked Swalley to remind Krebbs that he had to fill out the form, and Swalley did so on July 8. When Krebbs stated he did not have the forms, Swalley had Van Treese fax them to the site, and he gave them to Krebbs. The next morning, Swalley asked Krebbs if he had the insurance papers. When Krebbs replied no, Swalley stated that they were needed. He prepared and handed Krebbs a directive to bring the papers to work on July 10, or he would not be allowed on the jobsite.[11] Krebbs complied.

Krebbs testified that starting on about July 9 or 10, Corbly changed his assignments by assigning him to work alone and to jobs that he could not complete in the time given. However, he recounted only one such assignment: when he was given a job on July 10 to complete by July 12, which he believed would have taken six workers to finish. When Krebbs did not complete it by July 12, Corbly said nothing and gave him another assignment.

2. Dunn and Leineweber

Dunn worked as an electrical apprentice for ELC for 1 week in July 2002, until he went out on strike on July 19. The only jobsite he worked was Wal-Mart. On July 1, Leineweber started for ELC as an apprentice at Wal-Mart and worked there until he went out on strike on July 29.

The normal workday was 7 a.m. to 3:30 p.m. At the beginning of the workday, employees regularly gathered at the gangbox to receive their assignments from Patterson, the jobsite supervisor.

Both Dunn and Leineweber testified consistently that on July 12, the day after Dunbar began handbilling at Wal-Mart, Patterson mentioned at such a gathering that she realized the Union had been on the jobsite handbilling. She said she really did not care if they went union or not, but she did not want any union talk on company time.

It is clear from the testimony not only of Dunn, Leineweber, and Grunde but of Supervisor Freese, as well, that there was no previous policy in effect prohibiting employees from talking about personal matters during the workday. Freese was a credible witness, other than with regard to the circumstances surrounding the warning issued to Thacker on September 26, in which his superiors apparently intervened, and I credit his testimony where it differs from that of ELC management. Freese testified that his understanding of the no-solicitation rule in the ELC policy handbook (the handbook),[12] provided to employees, was that it prohibited people coming in to sell, and this was strictly enforced. However, he further testified that this rule did not prevent employees from talking on the jobsite and that they could talk about whatever they wanted, as long as it did not interfere with production. Freese further testified that in the 6 or so years he has been a supervisor, he has never had occasion to write up an employee for violating the no-solicitation rule.

After receiving a union shirt from Dunbar on July 15, Dunn wore it to work the following morning. At 9:15 a.m., Patterson pulled him off the job on which he was hanging lights with employee "Rorey." She took him to a private area and said, "I can't believe you're doing this. It's a slap in the face. I told you I didn't want any union guys on my job. I'd fire you if I could. I'm going to make sure everybody on this jobs knows you are a union mole working on this job, and nobody will look at you the same."[13] Dunn responded that he would continue to work the same and wanted no problems. Patterson told him to hang around the gangbox, and she called over the other 15–20 employees.

Dunn, Adair, Grunde, Leineweber, and Thacker all testified about what Patterson then said with all of the employees present. Their accounts were substantially similar, although not identical, leading me to conclude that their testimony was based on genuine recall and not "scripted." Because Dunn was the one she targeted, I believe he would have paid the most attention to her precise words, and he in fact appeared to have the most complete recall. Accordingly, I accept his version of Patterson's statements. I give no weight to the undated, unauthenticated memorandum Patterson purportedly wrote at some point concerning what she said at the meeting.[14]

Patterson said, "I want to introduce everybody to Jason Dunn. If you haven't met him already, he is our Union mole on this job. I want you to stay away from him and don't talk to him about the Union, don't let him get any of your personal information. . . . I'd fire him if I could, but I can't because he works for the Union."[15] She further stated that if there were any ditches or "crap" work to be done, he would be doing it, but there wasn't any. She concluded by telling other employees that they could not reach him on company time between 7 a.m. and 3:30 p.m. but "I don't care what you do to him after that. That's personal."[16] She asked Dunn if he wanted to comment, but he said no. The meeting ended, and Dunn went back to hanging lights.

Leineweber wore a union shirt to work the following morning, July 17. Patterson told him that she was not surprised that he was the other union mole. She then assigned him to work with Dunn, "so we couldn't spread the Union shit to other E.L.C. employees."[17] At about 9 a.m., Leineweber went to Dunn, who was hanging light fixtures with Rorey, and related what Patterson had said. For the rest of the day, Dunn and Leineweber worked together hanging light fixtures.

[10] Tr. 517.
[11] GC Exh. 38.
[12] GC Exh. 39 at p. 32.
[13] Tr. 752.
[14] GC Exh. 31.
[15] Tr. 754.
[16] Tr. 755.
[17] Tr. 268.

On the morning of July 18, before assignments were made, Patterson said to Leineweber that if he was going to go union, she did not understand why he did not just get out and go. That morning, Dunn and Leineweber resumed hanging light fixtures. At about 11 a.m., Swalley approached Leineweber and asked him if he had learned anything about "the fucking union" when he worked for a named employer. Swalley did not deny making this comment, and I credit Leineweber's uncontroverted account.

Later in the morning, after Dunn and Leineweber had hung light fixtures for about 2 hours,[18] Patterson pulled them off the lift without explanation and told them to sweep up the whole place and pick up trash. They engaged in such work for the remainder of the day. Cleanup work was a function rotated among employees. Previously, Leineweber had never performed cleanup, while Dunn had done cleanup in between assignments, for approximately one half-1 hour at a time and had seen others perform such work for similar periods. Although the pay was the same, both Dunn and Leineweber considered cleanup work less desirable because it required less skill. This was Dunn's last day of work for ELC. The next day, Leineweber was reassigned to hang lights with another apprentice.

At the morning gangbox meeting on July 19, Patterson approached Leineweber. She asked if Dunn had gone union and, if so, why Leineweber did not go with him.

C. The July 2002 Strike

By letters dated July 19, 2002, Dunn, Krebbs, George Nichols, and Robert Nichols advised ELC that they were going out on strike to protest ELC's unlawful labor practices.[19] Leineweber did the same by letter dated July 29.[20]

The July 19 letters stated:

> I am protesting the multiple unfair labor practices of E.L.C. Electric, Inc. E.L.C. has repeatedly discriminated against individuals in violation of the National Labor Relations Act. This unlawful conduct includes but is not limited to, the following incidents:
>
> 1. E.L.C. has repeatedly harassed employee, Jason Dunn, in retaliation for his protected activities.
>
> 2. E.L.C. has repeatedly harassed employee, George Nichols, in retaliation for his protected activities.
>
> 3. E.L.C. has repeatedly harassed employee, Robert Nichols, in retaliation for his protected activities.
>
> 4. E.L.C. has repeatedly harassed employee, Brad Krebbs, in retaliation for his protected activities.
>
> I request that E.L.C. fully remedy its unlawful conduct by removing all improper discipline from employee personnel records, by making all employees whole for all losses suffered by this discrimination, and by informing its workforce that E.L.C. will no longer discriminate against employees based on their union activities.
>
> As of this date, I am commencing an Unfair Labor Practice Strike to protest the multiple Unfair Labor Practices committed by Edwards.[21]

Leineweber's letter was identical other than adding his name to the above listed employees.

Robert Nichols did not testify about any alleged harassment he received. As noted earlier, George Nicholas did not testify at all.

Krebbs' last day of work for ELC was July 19. Corbly testified without controversion that shortly before lunch that day, Krebbs told him that he had to go to the hospital to see his ailing mother and would get in touch when he would be able to return. Krebbs left at that point and never came back. Krebbs was off from work for 1 to 1-1/2 weeks and then went to work for another company, where he was employed for approximately 6 months.

On July 19, Dunn, George Nichols, and Robert Nichols went to the union hall and met with Dunbar. After signing letters that they were on strike, the three went with Dunbar to the Union's apprenticeship office, where they received placements with union companies. Dunn worked for his new employer 1 hour that day and began full-time employment the following Monday, July 22. Robert Nichols was placed with another union company, for whom he started on either Monday or Tuesday, July 22 or 23.

Leineweber's last day of work for ELC was on or about July 28. He went to work for a union employer on August 1.

The only actions taken by the five employees who went on strike were their signing letters and not returning to work for ELC. None of them ever carried a picket sign or had any further contact with ELC concerning the strike.

D. Other Preelection Allegations and Union Objections

1. Objection 1—alleged promise of benefits, interrogation, and impression of surveillance

These allegations involved employees Adair and Sanderson, and management representatives Passman and Swalley. The promise of benefits is the subject of Union Objection 1 to the election. My assessment of Swalley's credibility was previously set forth. Sanderson appeared candid, and I have no reason to doubt his credibility. Accordingly, his testimony is credited. More will be said about the credibility of Adair and Passman below.

In mid-September 2002, as part of ELC's preelection campaign, Passman and Swalley visited various jobsites to address employees. I credit Swalley, Adair, and Sanderson that Passman made preliminary statements about the election prior to asking for questions. In fact, Swalley specifically testified that Passman had "a written presentation" so there would be consistency in what he said at the different sites. In contrast, Passman was evasive when asked if he gave a speech prior to asking for questions, testifying that he could "not recall." The General

[18] See GC Exh. 34, job timesheet for Wal-Mart employees that week.
[19] CP Exhs. 8–11.
[20] CP Exh. 12.

[21] The reference to Edwards Electric was, Dunbar testified, an inadvertent error as the result of using a previous letter as a model. I accept his explanation and draw no negative inferences against the strikers or the Union from that erroneous reference.

Counsel does not allege that anything Passman said in his preliminary statements violated the Act, nor does the Union contend that any of those remarks interfered with the election.

After his remarks, Passman asked for questions. An employee asked if the Company was going to try to get better health insurance. Sanderson's and Adair's accounts of Passman's answer comported with Passman's account. Passman responded that ELC was actively seeking to improve health insurance benefits by the end of the year but made no promise thereof. At the time this occurred, ELC was required to change its health insurance carrier on January 1, 2003, as the result of the settlement of a lawsuit. ELC in fact switched carriers in November or December 2002.

Adair testified that after the meeting, Passman and Swalley asked him to accompany them around the side of the trailer, to talk in private. After saying it was "off the record," Swalley said he heard Adair was prounion. Adair replied no and asked who had said that, but Swalley did not answer. His conversation was not mentioned in Adair's April 15, 2003 Board affidavit, and he offered no explanation for its omission. However, neither Passman nor Swalley specifically denied the conversation. Adair never engaged in union activities as an ELC employee and has never been involved in any lawsuits with ELC. He struck me as candid. For example, he testified that Patterson at the September gangbox meeting told employees they could make up their own minds when it came to voting for the Union and vote the way they felt. This would have been inconsistent with an effort to skew his testimony to overstate her antiunion remarks. Similarly, his account of what Passman said at the group meeting demonstrated no apparent desire to show management animus toward the Union. In all of these circumstances, I credit Adair's account of what Swalley said to him, and his testimony in general.

The Regional Office opined that the allegation in paragraph 5(e) of the complaint might give rise to valid objections to the election. Thus, Thacker testified that on at least five different occasions in late July and early August, after he returned from lunch (sometimes with Dunbar), Patterson told him that he could not talk about the Union on the job. Since Patterson did not testify, this testimony went uncontroverted. The statements Thacker attributed to her were consistent with what she had told other employees, and I credit his account of them.

2. Objection 2—pay raises

Grunde and Thacker were hired as apprentices and later enrolled in a Bureau of Apprenticeship and Training (BAT) certified 4-year apprenticeship program. ELC encouraged but did not require such enrollment, except when the job was prevailing wage.

Thacker signed the apprenticeship documentation on July 9, 2002, and was indentured on July 29, whereas Grunde executed the documentation on June 24 and was indentured on July 9.[22] By letters dated September 11 and 18, 2002, respectively,[23] ELC notified them they would receive wage increases to $11 an hour (from $10.50 an hour), retroactive to September 9, because they were in the apprenticeship program. Thacker testified that he had not requested the increase and, to his knowledge, was not scheduled for it. Nothing in the handbook states that employees will receive raises upon starting classes, and the Respondent provided no documentation showing that other employees similarly situated have received them.

3. Objection 3—posting of election notice

Calvert had the notice posted in the main breakroom at the office and in the warehouse office, and he sent a certified letter dated September 6, 2002, announcing election details to every employee.[24] He testified that he understood the Company's obligation was to post it in a conspicuous place in its main business location, and ELC tried to do that. He did not give any instructions about posting the notice at ELC jobsites, and it was not posted at all of them. He conceded that employees did not report to the main office before going to their assigned jobsites each day.

II. THE ELECTION AND ITS AFTERMATH

The *Excelsior* list contained the names of 26 employees, including Corbly, Freese, and Patterson.[25] On September 26, 2002, 25 of them voted. Twenty-four voted without challenge, of whom 11 voted for the Union, and 13 against. The five alleged unfair labor practice strikers, who were not on the list, also cast challenged ballots. On October 3, the Union filed timely objections.

A. Alleged Discrimination Against Thacker

Thacker worked for ELC from July 11 or 12 until mid- or late December 2002, when he went out on strike. He was first assigned to Wal-Mart. He later also worked at Sunman and at Indian Creek School, Trafalgar (Indian Creek), where Freese was the supervisor. Indian Creek was his primary jobsite after early September.

Although Thacker earlier engaged in union activity, the first evidence of Company knowledge thereof was on September 26, when Thacker served as the Union's observer at the election. When Thacker showed up at Indian Creek after returning from the election, Freese handed him a written warning for missing work the previous day[26] and said that "the shop" had said to write him up. Thacker had never received any prior warnings for attendance, either oral or written (the handbook, at page 13, provides for progressive discipline, starting with a verbal warning).

It is undisputed that Thacker had to take his daughter to a medical appointment on the previous morning, September 25, and that he informed Freese of this in advance. However, with regard to other details of what occurred on September 25 and 26, neither Thacker nor Freese was fully credible. According to Thacker, Freese said he would call the shop and inform them

[22] CP Exhs. 4 and 6, respectively.

[23] CP Exhs. 2 and 3.

[24] GC Exh. 4, a sample. The letter urged employees to remain "union free" and enclosed campaign propaganda.

[25] GC Exh. 3. As noted, the Union challenged Patterson's vote. It is problematic whether Corbly and Freese, who are also alleged in the complaint as statutory supervisors and whose status as such is not now in dispute, should have been allowed to vote.

[26] GC Exh. 47.

that Thacker would be late coming in on September 25. Thacker further testified that, to his knowledge, he was not obliged to call the shop. However, in his April 8, 2003 Board affidavit, he stated, "Freese said that was fine and I just needed to call the shop and tell them."[27] Consistent with what Thacker stated in his affidavit, Freese testified that he told Thacker to call the office (Swalley) as per policy (see page 26 of the handbook). I find that Thacker's testimony on this point, impeached by his affidavit and contradicted by other evidence, undermines his credibility.

On the other hand, in marked contrast to his unequivocal and straightforward testimony in general, Freese's testimony regarding this incident was confusing, contradictory, and often tentative, leading me to conclude that Freese did not initiate the warning. Although Freese testified that the starting time was 7 a.m., he also testified that when Thacker called him on the early morning of September 25, Thacker said, "[H]e would be roughly, about two and a half hours late. He said he would be there at 10:30—no later than 10:30."[28] If the starting time was 7 a.m., the math simply does not gibe. Freese further testified that the reason Thacker was written up was because he arrived "much later than that [10:30] . . . I believe."[29] However, the warning report states, "Called in/But was on job at 10:30 a.m."

Also rather curiously, Freese testified that either Passman or Swalley had him prepare a written memorialization of the event,[30] addressed to Passman, which also stated that Thacker arrived at 10:30 a.m. but had said he would be "a couple" of hours late. On cross-examination, Freese averred that on no other occasion has he ever prepared such a formal written memorandum for an employee coming in late; rather, he merely notates it on the actual absentee report. It further strikes me as suspicious that although Thacker did come to work on the morning of September 25, the Respondent waited until the next day—and after Thacker served as the Union's observer—to issue him the warning.

On September 27, only Freese and Thacker were assigned to Indian Creek. When it appeared that, due to rain, the site was too wet for Thacker to work, Freese called Swalley to see if there was any other work available for him. Swalley said no, and Freese told Thacker to go home and call the next day. Swalley later asked Freese to memorialize the incident in writing and address it to Passman, and Freese did so.[31] When asked on cross-examination, if he ever prepared a similar document when an employee had not worked, either on account of weather or for any other reason, Freese replied no.

On at least one occasion, in late August or early September 2002, when weather was inclement and there was only outside work to do at Indian Creek, Freese sent Thacker and Grunde to Wal-Mart for the workday. However, on some occasions, Thacker candidly testified, he was sent home on rain days rather than assigned to other jobsites.

[27] Tr. 736.
[28] Tr. 815.
[29] Id.
[30] GC Exh. 48.
[31] GC Exh. 49.

In late September or early October, Freese told Thacker at Indian School that they had no further work for him and would call him when work picked up. On his way home, Thacker called the shop. He spoke with Swalley, who said he could work at Sunman. Thacker reported to Sunman the next day and was there for about a week, before returning to Indian Creek.

Thacker last worked for ELC in December 2002 when, he testified, he went on strike. On cross-examination, however, it was revealed that in his affidavit to the Board, he stated, "I quit E.L.C. because I had a job at Barth Electric, a Union contractor."[32] He further stated therein that he started at Barth Electric on December 23, and that when he left ELC's employ, he merely said that he was not coming back. The Union never notified ELC that Thacker went out on strike, and neither the General Counsel nor the Union has contended that he was an unfair labor practice or economic striker.

B. The Layoffs of Sanderson, Trinosky, and Grunde in January and February 2003

Calvert and other ELC management and supervisors all testified that Swalley was the one who made decisions regarding when layoffs would take place and which employees would be selected. There was no set policy or criteria for determining who would be laid off.

1. Sanderson

Sanderson worked as a journeyman electrician for ELC from May 20, 2002, until January 9, 2003, when he was terminated. He worked at Wal-Mart under Patterson until September. At that time, he was reassigned to Sunman, where he remained until his layoff. Although he kept in contact with Dunbar after his hire, he did not overtly express support for the Union at work.

By letter dated November 5, 2002, faxed and sent by certified mail, the Union notified ELC that Sanderson was on the Union's organizing committee.[33]

I credit Sanderson's account of his meeting with Swalley on December 18, which was substantially corroborated by Sanderson's notes thereof,[34] over Swalley's testimony that he had no one-on-one conversations with employees the week of December 18. In this regard, Grunde also testified credibly that he had a performance review meeting with Swalley on December 18.

Swalley asked Sanderson to fill out a self-review. Sanderson commented that he did not feel Patterson cared much for him and did not think she would give him a fair review because of his union affiliation (Sanderson testified about accusations Patterson leveled against his performance in September, but they are not alleged as unfair labor practices). Swalley replied that was nonsense. Sanderson also stated that he felt he did not have a future with the Company and would be selected for termination because of his union affiliation. Swalley said that was "hogwash." He then repeatedly asked Sanderson if he was so prounion, why he went to work for a merit shop. Sanderson responded that he was not supposed to talk about the Union on company time, to which Swalley then said that other employees

[32] Tr. 732.
[33] GC Exh. 28.
[34] GC Exh. 72.

had complained about Sanderson talking about the Union, and his work had fallen off. Sanderson next stated that he was there to organize ELC. Swalley asked if it was fair that someone who just got hired should be able to force other people to go union. Sanderson replied that everyone had a vote. He asked Swalley if there was truth to the rumor of a layoff and how employees would be selected. Swalley answered, "Well, of course, we will try to keep all our loyal employees."[35]

At this meeting, Swalley stated that work was going to be slow in the months of January, February, and March. Swalley testified that he made a similar statement to Sunman employees as a group during the week of December 18. I find, therefore, that Swalley made such a statement to employees that week.

Swalley laid Sanderson off at Sunman on the evening of January 9, 2003.[36] There were about six employees on the project, including Eric Marshall, who was also laid off at the time; and Ron Hamilton, who was not. Sanderson believed that, according to company policy, he had more seniority than Hamilton, who had been incarcerated for a criminal conviction and therefore had a break in service. The handbook, at page 8, provides that "[a] break in service is when an employee has not worked for 60 days. All company benefits will be lost and He or She will then have to reapply to be considered for rehire." The Respondent did not rebut this testimony. Sanderson was never referred to a labor provider or recalled.

Swalley testified that Sanderson and the other journeyman on the job were laid off because work was slow, and Swalley no longer had need for journeymen on his jobsite. Rather, the work could be performed by Corbly and lower-paid apprentices.

Corbly, the jobsite supervisor, conceded on cross-examination that he was not certain if work was slowing down at the site at that time. This equivocation from the jobsite supervisor with much more firsthand knowledge of the job than Swalley seriously undermines Swalley's testimony. Additionally, strongly suggesting that any decrease in work in late 2002 and early 2003, was cyclical rather than out of the ordinary was Passman's testimony that during that period, projects were coming to the point where less manpower was required, "as it usually does, during that time of year."[37] This mirrors what Swalley told employees at Sunman in December.

Further undermining Swalley's testimony was his professed ignorance of the subject of ABC-required apprentice/journeyman ratios described in Charging Party's Exhibit 7, produced by the Respondent in response to a subpoena. He testified on cross-examination that he was not aware of such ratios and, moreover, did not even know who at ELC would be responsible for possessing such knowledge. It is inconceivable that a project manager of ELC, a member of ABC, who had primary responsibility for jobsite labor, would be so ignorant on this matter.

[35] Tr. 688.

[36] See GC Exh. 41, termination report. It had the notation that Sanderson was "eligible for rehire if work picks up."

[37] Tr. 901.

2. Trinosky

Trinosky was a journeyman electrician for ELC, first through National, from approximately September 2001 until March 5, 2002; and then directly as ELC's employee until February 2, 2003. His primary job assignments were at a K-Mart project, then Sunman and, finally, the Early Childhood School, Warren (Warren), where he was the supervisor until his replacement by Patterson in approximately mid-December 2002.

The General Counsel and the Union argue that Trinosky was never a statutory supervisory but a leadperson, and he testified that he considered himself the latter. However, Trinosky testified that he functioned in the same role as Corbly did. Thus, he assigned work to other ELC employees and coordinated the scheduling of work with the general contractor and other contractors on the job. He testified that in making assignments, he had to determine which employees could better perform the work. As I stated on the record, this reflects that he used independent judgment in making assignments, an indicia of supervisory authority under Section 2(11). Based on this and the record as a whole, I find that he was a statutory supervisor until his replacement by Patterson.

I note that Trinosky had a conversation with Passman a couple of weeks before the election, in which Passman told him *it was his job* to convince younger employees to vote against the Union. Presumably, if Trinosky were an employee, Passman's instruction would have constituted unlawful coercion and interference, but the General Counsel has not alleged it as a violation. Moreover, the General Counsel has not alleged that warnings Trinosky received in November and early December 2002, during his tenure as a supervisor, violated Section 8(a)(3). Inasmuch as these warnings, which related primarily to Trinosky's performance as a supervisor, are neither alleged in the complaint nor advanced by the Respondent as justification for his layoff, I need not address them further.

In any event, in approximately mid-December 2002, Patterson replaced Trinosky as the supervisor at Warren. He testified without controversion that his authority over other employees then stopped, although Patterson consulted with him on occasion. By letter dated February 3, 2003, sent and received by fax that day by ELC and also sent by certified mail, the Union notified ELC that Trinosky was on the Union's organizing committee.[38]

On February 5, 2 days later, Swalley laid Trinosky off.[39] Approximately 10 to 12 employees were working at Warren that day, including two journeymen who had more seniority than him. Trinosky testified there appeared to be at least another 3 months of work remaining on the project. He was never recalled or offered referral to a labor provider.

Swalley testified that Trinosky was a supervisor at the time of his layoff, and ELC no longer needed his services. However, prior to Trinosky's layoff, he had already been replaced by Patterson as supervisor and had resumed status as a journeyman electrician.

[38] GC Exh. 30.

[39] See GC Exh. 46, termination report. It had the same notation as Sanderson's.

3. Grunde

Grunde was employed by ELC from mid-June 2002, until his layoff on February 17, 2003. His primary work locations were Wal-Mart and Indian Creek. Patterson was his supervisor at the former; Freese at the latter.

In November 2002, Dunbar asked him to be a member of the union organizing committee, he agreed, and the Union notified ELC accordingly, by letter dated November 25.[40]

Grunde testified that in December 2002, when he was meeting with Swalley concerning his scheduled personnel review, Swalley said, "We got the letter. Can you tell me what this letter means to you?"[41] Grunde replied that he was officially supporting making ELC a union shop. Grunde's recall of Swalley's response was not precise, but Grunde indicated that Swalley expressed unhappiness over the Union's organizing effort but said it was not directed against Grunde in any form.

On the day Grunde was laid off at Indian Creek,[42] Swalley stated that things were slowing down and they had to lay off some people. He further said that things might pick up in a month or so when the project moved forward. There were 7 employees at the jobsite that day (previously, the number had varied from 3 to 10). At the time of Grunde's layoff, ELC retained five employees with less seniority who were making the same or a higher hourly rate than Grunde.[43] Grunde was never referred to a labor provider or recalled.

Swalley testified that Grunde was laid off because work at the jobsite was "moving a little slow and I really didn't need anyone of his skill level."[44] Swalley went on to explain that he did not consider Grunde to be "mechanically inclined." Any claim that Grunde's performance had anything to do with his selection for layoff is undermined by the fact that Grunde had been employed since June 2002, and the Respondent furnished no evidence that he had ever received any verbal or written warnings concerning the quality of his work.

C. The Layoffs of Remaining Employees and the "Transition" to Labor Providers

1. Use of labor providers prior to March 14, 2003

Meier of All Trades and Wise of National appeared candid and forthcoming in answering questions, and they provided documentation corroborating their testimony. I also credit Freese and Corbly regarding the use of labor provider employees at their jobsites before and after the transition.

All Trades contracts labor in the construction industry and has had ELC as a customer or client since approximately August 2000, providing it with electrical labor.[45] National has contracted electrical labor to ELC since the middle of 2001.[46]

All Trades and National operate very similarly. Both pay the employees they refer, determining hourly pay rates using such factors as the type of job, prior earnings, experience, and assessed skills. They also pay their employees various fringe benefits and handle payroll and administrative functions. All Trades and National do not provide jobsite supervision or large tools or equipment, which remain the responsibilities of the client. Clients are able to direct referred employees to projects where they are needed.

Both companies charge a client with what is called a "multiplier"—a billing rate times the hourly rate paid to the employee.[47]

Prior to the transition, employees of All Trades and National were used occasionally, when the workload was greater than ELC's own employees could handle. The number of All Trades employees used by ELC varied. Some months, there were none; at other times, there could be 10 or 12. At Indian Creek, temporary employees were used when needed. They worked full 40-hour weeks but only for short periods of time. Prior to the March 2003, all of the Sunman electricians were ELC employees.

2. The transition

ELC employed about 15 electricians (helpers, apprentices, and journeymen) as of March 14, 2003, the date of the transition to labor providers. On or about March 7, ELC mailed to employees a letter notifying them of the transition.[48] It opened by saying, "The fluctuations in our work load and the need for flexibility is causing ELC Electric to transition its business practices" and went on to state that some of the work force would be added to the management team, while all other employees would be offered assistance in locating to labor providers. Enclosed was a placement assistance form to complete and return to ELC, which would forward it to a labor provider.

On March 14, 13 electrical employees were laid off, including Adair and Tim Grow. General Counsel's Exhibit 12 is a sample of the termination letter that they received. Two previously nonsupervisory employees—Clint Beck and Josh Graham—were promoted to supervisors and continued in that capacity as ELC employees. ELC retained its managers, Passman and Swalley; and its supervisors, Corbly, Freese, Patterson, and Richard Shuster. I credit Freese's testimony and find that the job duties of ELC supervisors did not change after the transition. Van Treese and other office personnel have also continued to remain ELC employees, and Calvert conceded that administrative overhead has stayed the same.

Swalley told Adair and Grow at the time they were laid off at the Lawrence Township Fire Department jobsite (Lawrence) on March 14, to report back to that location the following Monday. Swalley asked Adair to return the handbook, but not ELC's hat or safety glasses.

Adair and Grow, along with 10 of the other 11 employees laid off on March 14, returned to ELC jobs the following week

[40] GC Exh. 29, faxed and sent by certified mail that day.
[41] Tr. 329.
[42] See GC Exh. 40, termination report, containing the same notation as Sanderson's and Trinosky's.
[43] See GC Br., app. A.
[44] Tr. 966.
[45] See GC Exh. 19.
[46] See GC Exh. 23.
[47] For All Trades, the current multiplier is 1.36 on straight rate, meaning that the client pays $1.36 per $1 paid to the employee, and 1.30 on overtime work. For prevailing or common wage jobs, the multiplier is 1.33 for straight time. See GC Exhs. 20, 21, and 62. For National, the multiplier ranges from between 1.45 and 1.60, based on the dollar amount and the length of time for the job.
[48] GC Exh. 11, a sample.

as employees of All Trades. They remained under the supervision of ELC. Adair and Grow reported back to Lawrence. Adair later worked as an All Trades employee at other projects of ELC, including Indian Creek and Warren. He testified without controversion that when he worked for ELC as an All Trades employee, his rate of pay remained the same, he continued to go to Passman or Swalley with requests for vacation or other absence, and nothing changed other than the name of the issuer of his paycheck.

Since the transition, there have been an average of approximately 15 employees of labor contractors working at Indian Creek: approximately 80 percent are from All Trades, with the remainder from National. Indian Creek remains an ongoing project.

General Counsel's Exhibit 60 reflects that as of the week of July 23, 2003, 21 All Trades employees were assigned to ELC, to six different sites, including Indian Creek (11 employees). Seventeen of the 21, and all of those at Indian Creek, worked 30 or more hours that week. One of those employees was Tucker, who worked there full time for 4 or 5 weeks. After March 2003, two employees (more, if needed) from All Trades have been performing work at Sunman.

As reflected in General Counsel's Exhibits 63 and 64, in the months of June through August 2003, National provided four employees to ELC at Indian Creek. There are no National employees currently on ELC projects.

3. The reasons for the transition

Calvert, the sole owner and 100-percent shareholder of ELC, testified that he alone made the decision to implement the transition in March 2003. His testimony on the subject, consistent with his testimony in general, smacked of evasion, was replete with internal inconsistencies, and was frequently contradicted by other witnesses of the Respondent. Calvert demonstrated an attitude of defensiveness, sometimes crossing over into argumentative, and at times appeared to show a contemptuous indifference to providing responsive answers.[49] For these reasons, I find his testimony about the transition unreliable and not to be credited. The following testimony reflects his patent unreliability as a witness.

Calvert continually professed lack of knowledge or uncertainty about matters that I would expect the sole owner and 100-percent shareholder of a small company to know. Thus, his testimony about his types of customers and the percentage of his business in each category was hopelessly confusing and vague. He could only make "a wild guess" what percentage of the business was for retail stores or what percentage was for institutional customers. Similarly, when asked whether he recalled when the Wal-Mart project and the Sunman project started and ended, Calvert said he could not.

As to when he decided to transition to labor providers, Calvert was evasive and ambiguous, as the following reflects:[50]

> A. We had—we had thought—about doing it several years ago. We had talked about it in various meetings, staff meetings . . . I can't give you an exact time and date when I started working on doing it.
>
> . . .
>
> Q. Who did you talk to in the staff meetings, and when was that?
>
> A. I don't have dates. And I don't have the exact people that . . . I had discussed things with.

Later, when asked for how long he had been planning the transition, he replied, for at least 1 to 2 years.

When asked how long it was between the time he made the decision to use labor contractors and when he communicated the decision to employees, he answered, "I can't tell you. I don't really know."[51]

When asked when he had discussions with All Trades about the transition, his response was, "I'm not sure about the dates."[52]

When asked how many ELC projects were going on in March 2003, at the time of the transition, his answer, once more, was, "I don't really know."[53]

When asked how many employees of labor providers ELC presently employs, he replied, "I don't know."[54]

When asked how many projects ELC currently is working on, he answered, "It could be five. There again, I don't really know."[55]

After he testified that ELC has used an outsource payroll company rather than ELC office personnel, he was asked when this started. He replied, "I'm not sure," and when next asked if it was under or over 2 years ago, again answered, "I'm not sure."[56]

Calvert also was frequently inconsistent in his testimony on important matters. Thus, he first testified that ELC had one major ongoing project at the time of the trial but later testified that he had to look at his books to determine if either Indian Creek or Southport is now the largest, clearly implying that there are two, not one, "major" ongoing project. Swalley also contradicted Calvert, testifying that ELC currently has four "large" school projects.

Calvert also shifted in answering why he decided to transition employees from ELC to labor providers. He initially testified that the reasons were for increased productivity and profitability, stating nothing about the workload at the time. Later, however, he testified the decision was made in March because "[o]ur workload was down with projects that we were finishing up."[57] Still later, however, he reverted to his earlier answer, and said that transition was made because, "First of all, health insurance was extremely high. There are so many employee

[49] For example, when asked when the transition occurred, he testified, "I believe, August or September [2002]" (Tr. 37), even though his counsel then immediately stipulated that it took place on March 14, 2003.

[50] Tr. 99–100.

[51] Tr. 102–103.

[52] Tr. 118.

[53] Tr. 113.

[54] Tr. 39.

[55] Tr. 127.

[56] Tr. 101.

[57] Tr. 171.

laws and regulations anymore, we didn't feel like our present staff could keep up with them. . . ."[58]

Any claim by Calvert that workload played a role in the decision to implement the transition was totally undermined by Passman, who testified as follows.[59]

> Q. You said that at the time you made the transition to eliminate your whole labor force, that things were slowing down; correct?
>
> A. No, not at the time of the transition. I don't believe I said that.

Passman went on to say that the workload at the time of the transition was substantially the same as before. Passman's testimony on this was implicitly supported by Swalley's remarks to Adair on March 10, as will be described subsequently. I so find as a fact that the level of work was not down in March 2003.

Jerry Tucker, who is not a union member, has worked as a journeyman electrician for ELC through All Trades on several occasions. The most recent was from June 1 until August 12, 2003, when he was laid off.

Tucker had three conversations with Swalley regarding employment: the first was on December 31, 2002, at the ELC Tractor Supply, Greenfield site; the second and third were on January 7 and March 14, 2003, respectively, at Warren. Although his recollection of exact words was not precise, particularly in the first conversation, Tucker appeared sincere. While Tucker testified about three specific conversations with Swalley, Swalley could not recall any conversations with Tucker present in December or January, and in his testimony he did not address the March 14 conversation as related by Tucker, which therefore went unrebutted. For these reasons, I credit Tucker's testimony.

Swalley rarely spoke with Tucker, other than to greet him, but in December, Swalley initiated the conversation. Swalley stated that he wanted to hire Tucker and Wes Fink, another All Trades employee, but couldn't "because of all the union stuff." He further said that the Union wanted to run him out of business. Tucker, afraid of sounding prounion, responded to the effect that he thought the Union was unfair. In the January conversation, Swalley approached Tucker and stated that he wanted to hire Tucker and to get rid of a couple of other people for various reasons, but he couldn't just hire and fire whomever he wanted because he was afraid of getting sued by the Union.

After a layoff, Tucker was reassigned to Warren on March 14. That day, he told Swalley that he was glad to be back to work. Swalley responded that for all practical purposes, he was an employee of ELC. Swalley further said that Tucker and Fink were the kind of employees he wanted to keep. At Indian Creek, Tucker's last assignment for ELC, Freese was his supervisor.

Adair, an employee of ELC since July 8, 2002, testified that on March 10, 2003, Swalley came to him and Grow at Lawrence. He gave them enrollment forms for All Trades and said that they had to fill them out and give them back to him in order to continue working at the project. When Grow asked why, Swalley stated, "off the record," that ELC was doing this because of all of the pending lawsuits and the problems with the Union; Swalley also said that everybody but a few individuals who were going to be kept as managers had to switch to All Trades.

Swalley made a general denial about having any conversations about the Union that day but did not specifically deny the statements Adair attributed to him. When Swalley was asked what he told Grow and Adair on that occasion, he did not give a direct answer, testifying, almost apologetically, "Basically I was just as surprised as they were. I had just found out about it the day before. And I was just instructed to give them the letters. . . . We were all kind of confused as to what was going on . . . . It happened very quickly, it caught me by surprise."[60]

In light of my conclusion that Adair was a credible witness, as detailed earlier, and Swalley's somewhat nonresponsive answer, I credit Adair's version of what Swalley said regarding the reasons for the transition. Swalley's testimony about his reaction to finding out about the transition did seem spontaneous and genuine, and I credit it.

III. ANALYSIS AND CONCLUSIONS

A. The Respondent's Conduct Before the July 2002 Strike

I will first address the allegations in the complaint of independent violations of Section 8(a)(1) and then turn to the alleged discrimination against Krebbs, Dunn, and Leineweber.

Paragraph 5(a) relates to Swalley telling Krebbs at Sunman on about July 9, 2002, that he had to complete insurance forms. Although the complaint alleges that Swalley "informed employees they would be discharged unless they completed insurance forms because those employees engaged in union activity," the record does not reflect that Swalley said anything about union activity in his conversations on the subject with Krebbs, either directly or indirectly. Accordingly, I recommend dismissal of this allegation.

Paragraphs 5(b), (c), (d), and (k) all relate to Patterson's conduct at Wal-Mart in mid-July. In her conversations with employees at the gangbox on July 12 and 16, Patterson told them that they could not talk about the Union on worktime. There is no evidence that employees were previously told they could not talk about nonwork matters on company time and, indeed, Supervisor Freese testified that employees were permitted to talk about anything they wanted on the jobsite, as long as it did not interfere with production. Patterson never notified employees that she was rescinding the new rule. Accordingly, Patterson, by promulgating and maintaining a rule prohibiting employees from discussing or soliciting only on behalf of the Union violated Section 8(a)(1). See *ITT Industries*, 331 NLRB 4 (2000); *Emergency One*, 306 NLRB 800 (1992). Therefore, I sustain the allegation in paragraph 5(b).

Patterson singled Dunn out, both one-on-one and before a group. She called him a union "mole"; told other employees not to talk to him about the Union, to stay away from him, and to avoid giving him personal information; said she would fire

[58] Tr. 1015.
[59] Tr. 917–918.
[60] Tr. 951–952.

him if she could; said she would give him "crap work" if there was any to be done; and finished by saying that other employees could not "reach him" on company time but "I don't care what you do to him after that." I find that her statements, all directed against Dunn, included an implicit threat of physical violence (indeed, she seemed to encourage it), an implicit threat of more onerous work assignments, denigration, and an instruction to employees not to discuss the Union with him. Accordingly, I sustain all of the allegations in paragraph 5(c).

Paragraph 5(d) relates to Patterson's assigning Dunn and Leineweber to work together on July 17. Leineweber testified without controversion that Patterson told him he was being assigned to work with Dunn, "so we couldn't spread the union shit to other E.L.C. employees." I find sustained allegation (d)(i), that she told employees they were being isolated because of their support for the Union. Subparagraph (d)(2) further alleges that by isolating them, Patterson created the impression among employees that their union activities were under surveillance. However, prior to this, both Dunn and Leineweber wore union shirts to work, and the Union sent letters to ELC stating that they were on the organizing committee. Their union affiliation therefore was open and known, rather than covert. Patterson said nothing to suggest that her knowledge of their activities was based on anything else. Contrast, *Peter Vitale Co.*, 310 NLRB 865, 874 (1993). Accordingly, I recommend this allegation be dismissed.

Paragraph 5(k) concerns Patterson's statements to Leineweber on July 18 and 19. The first was that if he was going to go union, she did not understand why he did not just leave; the second, that if Dunn had gone union, why Leineweber did not go with him. The General Counsel alleges this constituted solicitation to quit his employment. Although I would characterize her statements as implied threats of termination (see *McDaniel Ford*, 322 NLRB 956 (1997)), I conclude that they also amounted to such solicitation and therefore violated Section 8(a)(1) on that basis.

Turning to the allegations of discrimination, the framework for analysis is *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 889 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under *Wright Line*, the General Counsel must make a prima facie showing sufficient to support an inference that the employee's protected conduct motivated an employer's adverse action. The General Counsel must show, either by direct or circumstantial evidence, that the employee engaged in protected conduct, the employer knew or suspected the employee engaged in such conduct, the employer harbored animus, and the employer took action because of such animus.

Direct evidence of an antiunion motive in discharge cases is often lacking and, for that reason, reliance on circumstantial evidence, and reasonable inferences deriving therefrom, is appropriate and often necessary. *Laro Maintenance Corp. v. NLRB*, 56 F.3d 224, 229 (D.C. Cir. 1995); *NLRB v. Warren L. Rose Castings*, 587 F.2d 1005, 1008 (9th Cir. 1978); *McGraw-Edison Co. v. NLRB*, 419 F.2d 67, 75–76 (8th Cir. 1969). Thus, "Illegal motive has been implied by a variety of factors such as 'coincidence in U activity and discrimination.' . . . 'general bias or hostility toward the union' . . . 'variance from the employer's normal employment routine' . . . and 'an implausible explanation used by the employer for its action' . . . ." *McGraw-Edison Co. v. NLRB*, id. at 75.

Under *Wright Line*, if the General Counsel establishes a prima facie case of discriminatory conduct, it meets its initial burden to persuade, by a preponderance of the evidence, that protected activity was a motivating factor in the employer's action. The burden of persuasion then shifts to the employer to show that it would have taken the same adverse action even in absence of the employee's protected activity. *NLRB v. Transportation Corp.*, 462 U.S. 393, 399–403 (1983); *Kamtech v. NLRB*, 314 F.3d 800, 811 (6th Cir. 2002); *Serrano Painting*, 332 NLRB 1363, 1366 (2000); *Best Plumbing Supply*, 310 NLRB 143 (1993). To meet this burden, "an employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct." *Serrano Painting*, supra at 1366, citing *Roure Bertrand Dupont*, 271 NLRB 443 (1984).

Although the Board cannot substitute its judgment for that of an employer and decide what would have constituted appropriate discipline, the Board does have the role of deciding whether the employer's proffered reason for its action was the actual one, rather than a pretext to disguise antiunion motivation. *Detroit Paneling Systems,* 330 NLRB 1170 (2000); *Uniroyal Technology Corp. v. NLRB*, 151 F.3d 666, 670 (7th Cir. 1998).

Prior to the actions of the Respondent alleged to be discriminatory, Krebbs, Dunn, and Leineweber all had engaged in union activity, and the Respondent was aware of such. Thus, Dunbar faxed a letter to ELC on July 8, 2002, stating that Krebbs was chairman of the organizing committee, and faxed letters to ELC on July 15 and 17, stating that Dunn and Leineweber were on that committee. Moreover, before any action was taken against Dunn and Leineweber, they had worn their union shirts to work.

Specific animus directed against Dunn and Leineweber is evidenced by Patterson's 8(a)(1) statements to them. Indeed, Patterson expressly told Leineweber on July 17 that she was assigning him to work with Dunn so they would not "spread the union shit" to other employees, and on the morning of July 18, both Patterson and Swalley made remarks to him expressing antiunion animus.

As to Krebbs, animus can be inferred from the fact that the conduct against him occurred almost immediately after the Respondent learned of his union activity and the animus previously demonstrated by Patterson. ELC is small company run by Calvert as the sole owner, and I believe that Supervisor Patterson's statements about the Union were made not sua sponte but with the approval, express of tacit, of higher management.

The actions taken with regard to Krebbs included management's asking for the return of his lockbox key, Swalley demanding he complete health insurance papers, and Corbly giving him an assignment that he could not complete in the time he was given. Regarding Dunn and Leineweber, Patterson isolated them from other employees and assigned them to work together on cleanup.

The threshold issue regarding Krebbs is whether the actions taken against him were adverse. As to Swalley's taking away his key, Krebbs testified that it aggravated him "a little" but had

no effect on his work. Regarding the job assignment on July 10, which Krebbs did not finish in time, Corbly said nothing about his failure to complete it, issued no warning, and instead merely gave him another assignment. Krebbs continued working for ELC until on about July 19, when he went out on strike. I conclude that these actions of the Respondent did not rise to the level of acts of discrimination violating Section 8(a)(3).

On the matter of the health insurance papers, Krebbs testimony was not credible. Although he denied having being told earlier that he had to fill out an election form, Van Treese had sent him a letter dated June 5, specifically asking him to do so by June 21. In any event, I find it difficult to see how telling an employee to complete an election form, accepting or waiving a fringe benefit, has any kind of coercive or otherwise negative impact on the employee. Assuming arguendo that the Respondent's insistence that Krebbs fill out the form was an adverse action, based on Van Treese's letter and Swalley's testimony, I conclude that the Respondent acted in conformity with its normal practice and had a legitimate business reason, to wit, documentation of an employee's wishes. I therefore conclude that the Respondent has met its burden of persuasion of showing that it would have demanded Krebbs submit the form in the absence of his union activity.

Based on the above analysis, I conclude that the allegations of discriminatory conduct against Krebbs should be dismissed.

Turning to Dunn and Leineweber, I credit the latter's testimony that Patterson told him on the morning of July 17 that she was assigning him to work with Dunn to prevent them from talking about the Union to other employees. Patterson did not testify, and the Respondent has failed to meet its burden of persuasion of showing that they would have been segregated absent their union activity. Accordingly, this violated Section 8(a)(3) and (1).

Concerning Patterson's assignment of Dunn and Leineweber to sweep and otherwise clean up on July 18, cleanup was a task rotated among employees. However, the timing of the assignment vis-à-vis statements that Patterson and Swalley made to Leineweber that morning raises a strong inference that the action was motivated by animus. Patterson did not testify, and I conclude that the Respondent has failed to meet its burden of persuasion of showing it had a legitimate business reason for pulling Dunn and Leineweber off their electrical job and having them perform the less desirable work of cleanup for the remaining 6 hours of the workday. See *L.S.F. Trucking*, 330 NLRB 1054 (2000); *Bestway Trucking,* 310 NLRB 651 (1993). Therefore, I conclude that this assignment constituted unlawful discrimination in violation of Section 8(a)(3) and (1).

B. The Strike in July 2002

The above conduct of ELC constitutes the sole evidence of employer action alleged to have constituted prestrike unfair labor practices. The Union's letter of July 19, 2002, announced that Dunn, Krebbs, George Nichols, and Robert Nichols were going out on strike, due to discrimination against each of them. However, although Robert Nichols testified, he did not testify about any actions taken against him by ELC, and the record does not reflect any actions taken against George Nichols. The letter of July 29 regarding Leineweber going out on strike added his name to the list of alleged discriminatees.

As I stated at the trial, the fundamental issue here is whether the above-named employees went out on "strike." The Taft-Hartley Act added a definition of "strike" to the Act that reads as follows:

> (1) The term "strike" includes any strike or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective-bargaining agreement) and any concerted slow-down or other concerted interruption of operations by employees.[61]

In determining the existence of strike activity, the Board has distinguished between an employee's withholding of services pending desired remedial action by the employer, and abandonment of employment with no intention of returning. The latter activity, whether undertaken individually or in concert, is unprotected. *Greyhound Food Management*, 198 NLRB 1146 (1972); *Crescent Wharf & Warehouse Co.*, 104 NLRB 860, 861–862 (1953). This is so even if the concerted action resulted from dissatisfaction with wages or working conditions (*Essex International*, 222 NLRB 121 (1976); *Eaborn Trucking Service*, 156 NLRB 1370 (1966)), or it was in protest of the discharge of another employee (*Fashion Fair,* 163 NLRB 97 (1967)).

George Nichols did not testify about the circumstances surrounding his cessation of work for ELC, and I therefore conclude that he has failed to show that he was a striker. Corbly testified without controversion that Krebbs stated that he had to stop working because his mother was in the hospital and that he would get back in touch when he would be able to return to work. Krebbs, in fact, went to work for another company about a week or so after he left ELC. I conclude in these circumstances that Krebbs voluntarily quit his employment rather than became a presumptive striker.

I now address the remaining strikers: Dunn, Leineweber, and Robert Nichols. Almost simultaneously with their signing of letters to ELC that they were going out on strike, all of them received union hiring hall referrals to union employers, for whom they began work almost immediately. After they left ELC's employ and sent the letters, they never took any other action in support of their purported strike, otherwise returned to ELC jobsites, or engaged in any other conduct evidencing an interest in ever returning to work for ELC. Obtaining employment *after* going on strike does not ipso facto establish that an employee quit his or her job. *Noel Corp.*, 315 NLRB 905, 909 (1994). Here, however, the employees got new jobs at the same time they ceased working for the Respondent. The close timing and other circumstances suggest that they knew they already had new jobs at the time they signed their letters to ELC.

In light of all of the above circumstances, I conclude that Dunn, Leineweber, and Robert Nichols voluntarily quit the Respondent's employ with no intention of returning, rather than engaged in a bona fide strike, whether characterized as unfair

[61] 29 U.S.C. §142(2).

labor practice or economic. It follows that they were not eligible to vote in the September 26, 2002 election.

I therefore sustain the challenges to the ballots of all five alleged strikers.

C. The Respondent's Conduct After the "Strike" and Before the Election

Paragraph 5(e) concerns Patterson's telling Thacker on at least five occasions in late July and early August 2002, that he could not talk about the Union on worktime, a reiteration of the rule she announced at the gangbox in July. For reasons previously explained, I conclude that this violated Section 8(a)(1). I also conclude that constituted an additional basis for setting aside the election.

Paragraphs 5(l)(i) and (ii) of the complaint relate to the conversation between Swalley and Adair following the preelection meeting Swalley and Passman held with employees at Sunman on September 19. Swalley said that he had heard that Adair was prounion. Adair said no and asked who had said that. Swalley did not answer. I conclude that Swalley's statement created the impression of surveillance and implicit interrogation of Adair concerning his union sympathies (as reflected by Adair's response). Therefore, I sustain these allegations.

Turning to the Union's objections to the election, Objection 1 relates to paragraph 5(f) of the complaint, which alleges that Passman at the above-preelection meeting impliedly promised employees improved benefits if they did not select the Union as their collective-bargaining representative. The subject of benefits was not contained in Passman's presentation. Rather, an employee asked if the Company was going to try to get better health insurance, and Passman responded that ELC was seeking to improve employees' health insurance benefits. I conclude that his answer did not expressly or implicitly associate an increase in benefits with the employee's rejection of the Union. Therefore, I conclude that he did not unlawfully promise a benefit. See *LRM Packaging,* 308 NLRB 829 (1992).

Accordingly, I overrule Objection 1.

Objection 2 concerns the pay raises that were given to Grunde and Thacker in September 2002, presumably because they enrolled in the apprenticeship program.

The conferral of benefits to employees during the critical period is not per se grounds for setting aside an election. The focus of the inquiry is whether the benefits were granted for the purpose of influencing the employees' votes and were of a type reasonably calculated to have that result. *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964); *Lampi, L.L.C.*, 322 NLRB 502 (1993); *United Airlines Services Corp.*, 290 NLRB 954 (1988). There is an inference that benefits conferred during the critical period are coercive, but the employer may rebut this by showing that it had a valid reason separate and apart from the pending election, such as following an established practice. *Lampi*, supra; *Uarco,* 216 NLRB 1, 2 (1974). Whether the employer committed other unfair labor practices during the same time period is a relevant factor. *Lampi*, supra at 503.

Here, the policy handbook is silent on the matter of an employee receiving a pay raise for enrolling in an apprenticeship program. The Respondent submitted absolutely nothing in writing to establish that it had a policy of giving pay raises for that reason or that any other employees ever received them. In the absence of such evidence, and in light of the Company's commission of numerous unfair labor practices in September, I cannot conclude that the Respondent has rebutted the inference that the pay raises granted to Grunde and Thacker were designed to influence their votes in the election. Consequently, their pay increases constitute a ground for setting aside the election.[62] *Lampi*, supra.

Therefore, I sustain Objection 2.

Objection 3 relates to posting of the notice of election. Admittedly, ELC posted the notice to employees only in the main breakroom at the office and in the warehouse, where employees did not report before going to their jobsites. It did send, by certified mail, a letter to employees telling them the details of the election.

Section 103.20 (a) of the Board's Rules and Regulations, 29 C.F.R. § 103.20(a), provides that "Employers shall post copies of the Board's official Notice of Election in conspicuous places at least 3 fully working days prior to . . . the day of the election." This requirement is mandatory in nature and may not be satisfied by alternative means of communication to employees. Thus, in *Terrace Gardens Plaza,* 313 NLRB 571, 572 (1993), the Board, in disagreement with the Regional Director, found an employer's mailing of the notice to employees in lieu of posting inadequate to satisfy the posting requirement. Here, ELC did not even mail the notice itself but instead communicated election details in letters that urged employees to vote against the Union.

The failure to comply with the notice requirement is an ipso facto ground for setting aside an election. No inquiry is made into whether the failure had any actual impact on whether employees voted. *Terrace Gardens Plaza*, supra at 572; *Smith's Food & Drug,* 295 NLRB 983 at fn.1 (1989).

Accordingly, Union's Objection 3 is sustained.

D. Violations of Section 8(a)(1) After the Election

Paragraph 5(g) relates to Swalley's conversations with Sanderson and Grunde on December 18, 2002, during their performance reviews. It is alleged in 5(g)(i) that Swalley interrogated employees about their union activities, and in 5(g)(ii) that he informed employees that employees would be laid off because of such activities.

Interrogation of employees is not per se unlawful. The Board looks at whether under all the circumstances the interrogation reasonably tends to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. *Emery Worldwide*, 309 NLRB 185, 186 (1992); *Rossmore House*, 269 NLRB 1186 (1984). In *Rossmore House*, the Board held it was no violation to question open and active union supporters about their union sentiments, unaccompanied by threats or promises.

Sanderson initiated mention of the Union and opined that Patterson would not give him a fair review because of his union affiliation. Swalley replied this was nonsense. Sanderson stated he did not feel he had a future with the Company and would be selected for termination because of his union affilia-

[62] The General Counsel does not allege the pay increases as an unfair labor practice.

tion, to which Swalley responded, "Hogwash." It was then that Swalley kept asking Sanderson if he was so prounion, why he went to work for a merit shop.

Thus, Sanderson triggered the discussion about the Union and his union affiliation, Swalley denied there would be retaliation against him for that affiliation, and Swalley's questions did not seek any information but were merely rhetorical in nature. Even if Swalley's questions are characterized as "interrogation," under all the circumstances, such interrogation was not coercive.

However, when Sanderson asked whether there would be a layoff and what criteria would be used for selection for layoff, Swalley gratuitously responded that ELC would try to keep its "loyal" employees. This occurred after their lengthy discussion about the Union and immediately after Sanderson stated he was there to organize employees and Swalley's comment questioning whether it was fair that someone who just got hired could force other people to go union. In this context, Swalley's statement about keeping loyal employees logically referred to employees who did not support the Union, and was therefore not overly ambiguous. Accordingly, I conclude that Swalley's statement was coercive.

In contrast to Swalley's conversation with Sanderson, Swalley raised the subject of the Union in his conversation with Grunde, by asking the meaning of the letter announcing Grunde was a member of the organizing committee. Swalley expressed unhappiness about the organizing effort, undercutting his assurance to Grunde that the unhappiness was not directed against him. The conversation took place in the context of Grunde receiving his performance review. In all of these circumstances, I conclude that Swalley's interrogation was coercive and violated Section 8(a)(1).

Based on the above, I sustain allegation 5(g)(i) (interrogation of Grunde) and allegation 5(g)(ii).

Paragraphs 5(h) and (i) concern Swalley's conversations with All Trades employee Tucker on December 31, 2002, and January 8, 2003, respectively, and allege that Swalley informed employees they could not be hired on a permanent basis because ELC employees had engaged in union activity. Inasmuch as Swalley's conversations with Tucker concerned the latter's being employed by ELC, I will consider Tucker to have been an applicant for employment and thus to have occupied the status of employee for 8(a)(1) purposes. See *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941); *J. L. Philips Enterprises*, 310 NLRB 11 (1993). The Respondent has not contended otherwise.

In the December conversation, Swalley stated that he wanted to hire Tucker and another All Trades employee but could not do so "because of all the union stuff." He further stated that the Union wanted to run him out of business. In the January conversation, Swalley volunteered that he wanted to hire Tucker and get rid of a couple of other people "for various reasons," but he could not just hire and fire whom he wanted because he was afraid of getting sued by the Union.

An analysis of whether Swalley's statements violated Section 8(a)(1), as with employer interrogation, hinges upon whether or not they were coercive. I deem it dispositive of this issue the fact that Swalley rarely engaged in conversation with Tucker but on those two occasions approached Tucker and accused the Union of being responsible for his not being able to obtain permanent employment with ELC. Swalley's statements had the natural effect of discouraging union activity or support, and, indeed, Tucker testified that he was afraid of voicing his prounion sentiments in response. I conclude, therefore, that Swalley's statements were coercive of Tucker's Section 7 rights, and I sustain the allegations in paragraphs 5(h) and (i).

Finally, the allegations in paragraphs 5(j)(i) and (ii) pertain to Swalley's conversation with Adair on March 10, 2003. Swalley told him that ELC was laying off employees and converting to the use of temporary labor services because of "pending lawsuits and the problems with the Union." I conclude that such statements were coercive and that these allegations therefore have been sustained.

E. Actions Taken Against Thacker After the Election

On September 26, 2002, Thacker received a written warning immediately upon returning from serving as the Union's observer at the election. The element of animus is established by violations of Section 8(a)(1) committed prior to September 26 by the Respondent. In any event, the timing of the issuance of the warning—on the same day Thacker served as the Union's observer—gives rise to the inference of animus. See *Olathe Healthcare Center,* 314 NLRB 54 (1994); *NLRB v. Rain-Ware*, 732 F.2d 1349, 1354 (7th Cir. 1984). The General Counsel has therefore established a prima facie of discriminatory conduct under *Wright Line*.

As detailed earlier, Freese's testimony—credible in general—was markedly confusing and contradictory regarding why he issued Thacker a written warning on September 26 for what Thacker had allegedly done the day before. Further, it was not consistent with ELC's documentation of the incident. A company's shifting of reasons for imposition of discipline is frequently indicative of discriminatory motive. See, e.g., *Central Cartridge, Inc.*, 236 NLRB 1232 (1978). Moreover, this was the first occasion when either Passman or Swalley instructed Freese to prepare a formal written memorialization of an incident involving an employee coming in late, and no explanation was offered for this unusual step. It is also significant that Thacker had received no prior warnings, oral or written, for absenteeism or tardiness but was issued a written warning instead of a verbal one.

I conclude, therefore, that the Respondent has failed to meet its burden of persuasion of showing that Thacker would have received the written warning had he not engaged in union activity. Therefore, its issuance violated Section 8(a)(3) and (1).

The General Counsel also contends that Swalley's refusal to reassign Thacker to work at another jobsite on September 27 was discriminatory. Again, the General Counsel has established the elements of union activity, knowledge, and animus. The pivotal question here is whether the "action" element has been met, to wit, whether the General Counsel has shown that there was other work available to which Thacker was not assigned.

There is no dispute that it was raining on September 27, that no other employees besides Thacker were assigned to Indian Creek, and that there were previous occasions when Thacker

was sent home on rain days rather than having been reassigned to work at other jobsites.

The fundamental problem is that the General Counsel has not established, let alone identified, other work that Thacker could have performed that day, either in terms of jobsites or number of hours. The Respondent has claimed there was none, and the General Counsel has provided no evidence to contradict that assertion. In these circumstances, I conclude that the General Counsel has failed to make a prima facie showing that the Respondent refused to reassign Thacker to available work and recommend that this allegation be dismissed.

F. The Layoffs of Sanderson, Trinosky, and Grunde in January and February 2003

The elements of union activity and employer knowledge thereof are satisfied for these employees by their agreeing to serve on the Union's organizing committee and by the Union's notification thereof to ELC. Swalley alluded to such notification when he spoke with Grunde on December 18. On that same day, Sanderson expressly told Swalley he was a union supporter. In terms of animus, I have found that agents of ELC committed numerous independent violations of 8(a)(1) in the time period from September 2002 to March 2003, including Swalley's interrogation of Grunde and his remark about loyal employees to Sanderson on December 18. All three employees were laid off. I conclude that the General Counsel has established prima facie cases of unlawful termination under *Wright Line*.

Turning to the Respondent's defenses for the layoffs, the Respondent submitted no documentation showing specifically what work levels were at the times of these layoffs and how they compared with work at the end of 2002.

Although Swalley testified that Sanderson and the other journeyman at Sunman were laid off on January 9 because work was slow, Corbly, the job supervisor, did not corroborate this justification. Certainly, Corbly had much more firsthand knowledge of the work at the site than Swalley, and his testimony seriously undermined the Respondent's proffered ground for Sanderson's layoff. Further, Sanderson testified that employee Hamilton was not laid off, even though he had had a break in service that caused him to have less seniority than Sanderson. The handbook provision on break in service, on its face, supports Sanderson's assertion. The Respondent did not controvert Sanderson's testimony and, indeed, offered no evidence at all on this point.

According to Swalley, Trinosky was a supervisor at the time of his layoff on February 5, and the Respondent no longer needed his services. Inasmuch as Trinosky was replaced as supervisor by Patterson the previous December, this asserted justification must fail. The Respondent has not provided any other reason for why Trinosky was selected for layoff.

Finally, as to Grunde, on February 17, the day he was laid off, ELC retained five employees with less seniority who were making the same or a higher hourly rate than he was. Swalley testified Grunde was laid off because work at the site was "a little slow" and because he considered Grunde to lack mechanical abilities. As previously stated, the latter reason is undermined by the fact that Grunde had been employed since June 2002, and never received any verbal or written warnings concerning the quality of his work. The Respondent offered no other reasons for why he was chosen for layoff.

In the absence of supporting documentation, conflicting statements from the Respondent's witnesses as to the volume of work in early 2003, and the Respondent's failure to establish bona fide reasons why Sanderson, Trinosky, and Grunde were selected for layoffs, I conclude that the Respondent has failed to meet its burden of persuasion of showing that they would have been laid off but for their having engaged in union activities. Accordingly, their layoffs violated Section 8(a)(3) and (1).

G. The Transition to Labor Providers in March 2003

At the time of the transition on March 14, 2003, the Union's objections to the election were still pending before the Regional Office. The Respondent had already committed numerous unfair labor practices, including the recent layoffs of Sanderson, Trinosky, and Grunde. Swalley had told employees Adair and Grow on March 10 that ELC was laying them off and changing to the use of labor providers because of pending lawsuits and problems with the Union. Prior to March 2003, the Respondent had used employees of labor providers only on an as-needed basis, to supplement the work of regular ELC employees. After March 14, most of the work on ELC jobs were performed by electricians who had been previously employed by ELC, and they continued under the supervision of ELC supervisors. Some continued on the same ELC jobsites where they had worked prior to March 14. Managers, supervisors, and office personnel all remained in ELC's employ after March 14. In sum, very little changed after the transition other than the elimination of electrical employees as ELC employees.

In light of these factors, I conclude that the General Counsel has established a prima facie case that ELC laid off its employees on March 14, 2003, because of their union activities, to wit, to avoid having further NLRB proceedings and the risk that the Union might ultimately be certified as the collective-bargaining representatives of its employees.

Calvert alone made the decision to eliminate ELC employees who performed electrical work and to switch to the use of labor contractors. As I previously detailed, his testimony on the reasons he made the decision—and his testimony in general—was evasive, inconsistent, and contradicted by other agents of the Respondent.

Specifically as to why he made the decision, Calvert gave three reasons during the course of his testimony. He initially testified it was for increased productivity and profitability, but he offered no elaboration on how the transition would accomplish this. Later, he testified the reason was because "our workload was down," an assertion directly contradicted by Passman, vice president of operations, who testified that the workload at the time of the transition was substantially the same as before. General Superintendent Swalley's testimony that he was very surprised to learn of the transition also implicitly contradicts Calvert's assertion that workload was a bona fide reason for the transition. Still later in his testimony, Calvert stated that the transition was made because he did not feel his administrative staff could keep up with "so many employment laws and regulations," again offering no elaboration. As noted earlier, a re-

spondent's offering shifting reasons for its actions frequently reflects discriminatory motive. Cf. *Central Cartridge*, supra.

In conclusion, Calvert's testimony on the transition was wholly unreliable and utterly failed to rebut the General Counsel's prima facie case that the layoffs of employees and switch to labor providers was motivated by legitimate business considerations rather than antiunion animus.

I conclude, accordingly, that the layoffs of ELC employees on March 14, 2003, and their having to work for ELC thereafter through labor providers violated Section 8(a)(3) and (1).

Conclusions—Case 25–RC–10131

I recommend that the challenges to the ballots of Christine Patterson a/k/a Christine Rossittis, Jason Dunn, Brad Krebbs, Corey Leineweber, George Nichols, and Robert Nichols be sustained and their ballots not opened or counted.

I recommend that Union's Objections 2 and 3 be sustained and that the election held on September 26, 2002, be set aside, and a new election ordered, due to objectionable conduct of the Respondent.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By the following conduct, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(a)(1) of the Act.

(a) Promulgated and maintained a rule prohibiting employees from discussing or soliciting on behalf of the Union.

(b) Suggested physical violence against employees because they supported the Union.

(c) Denigrated employees because they supported the Union.

(d) Instructed employees not to discuss the Union with other employees.

(e) Isolated employees from other employees because of their support for the Union.

(f) Solicited employees to quit employment because they supported the Union.

(g) Created the impression among employees that their union activities were under surveillance.

(h) Interrogated employees concerning their union activities and sympathies.

(i) Told employees they would be laid off because of their union activities.

(j) Told prospective employees they could not be hired because the Respondent's employees had engaged in union activity.

(k) Told employees they were being laid off and would be required to work through a labor provider because they engaged in union activity.

4. By assigning more onerous working conditions to Jason Dunn and Corey Leineweber; by issuing written discipline to Demarco Thacker; by laying off employees Bruce Sanderson, Jonathan Trinosky, and Mikalis Grunde; and by laying off all remaining employees and requiring them to apply for employment through a labor provider, the Respondent engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(a)(3) and (1) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily laid off employees, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The General Counsel seeks an order requiring the Respondent to reinstitute its practice of employing employees as it existed prior to January 8, 2003, the date Sanderson was laid off. Such an order is warranted, but the Respondent actually changed its practice at the time of the transition, when it switched to the exclusive use of labor providers. Accordingly, March 14, 2003, is the appropriate operative date.

The General Counsel also seeks expungement from the Respondent's records of any references to the unlawful written discipline issued to Thacker and to the unlawful layoffs of Sanderson, Trinosky, Grunde, and all remaining employees on March 14, 2003.

The General Counsel has not requested a broad cease and desist order.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[63]

ORDER

The Respondent, E.L.C. Electric, Inc., Indianapolis, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promulgating and maintaining a rule prohibiting employees from discussing or soliciting on behalf of the Union.

(b) Suggesting physical violence against employees because they support the Union.

(c) Denigrating employees because they support the Union.

(d) Instructing employees not to discuss the Union with other employees.

(e) Isolating employees from other employees because of their support for the Union.

(f) Soliciting employees to quit employment because they support the Union.

(g) Creating the impression among employees that their union activities are under surveillance.

[63] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(h) Interrogating employees concerning their union activities and sympathies.

(i) Telling employees they will be laid off because of their union activities.

(j) Telling prospective employees they cannot be hired because ELC employees engaged in union activity.

(k) Telling employees they are being laid off and will be required to work through a labor provider because they engaged in union activity.

(l) Assigning more onerous working conditions to employees because of their union activities.

(m) Issuing written warnings to employees because of their union activities.

(n) Laying off employees because of their union activities.

(o) Requiring employees to apply for employment through a labor provider.

(p) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Mikalis Grunde, Bruce Sanderson, Jonathan Trinosky, and those employees laid off on March 14, 2003, full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Mikalis Grunde, Bruce Sanderson, Jonathan Trinosky, and those employees laid off on March 14, 2003, whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the Decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful layoffs of Mikalis Grunde, Bruce Sanderson, Jonathan Trinosky, and those employees laid off on March 14, 2003, and, within 3 days thereafter, notify each of them in writing that this has been done and that the layoffs will not be used in any way against them.

(d) Within 14 days of the Board's Order, remove from its files any reference to the unlawfully written warning issued to DeMarco Thacker on September 26, 2002, and within 3 days thereafter, notify him in writing that this has been done and that the written warning will not be used in any way against him.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Reinstitute its practice of employing electrical employees as it existed prior to March 14, 2003.

(g) Within 14 days after service by the Region, post at its facility in Indianapolis, copies of the attached notice marked "Appendix."[64] Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 12, 2002.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

IT IS FURTHER ORDERED that the proceeding in Case 25–RC–10131 be severed and remanded to the Regional Director for Region 25 for further action consistent with this decision.

[64] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

E.L.C. Electric, Inc., and its alter ego and/or successor Midwest Electric & Retail Contractors, Inc., d/b/a MERC, Inc., and Asset Management Partners, Inc., a single integrated enterprise and single employer, and Edward L. Calvert, individually *and* International Brotherhood of Electrical Workers, AFL–CIO.

E.L.C. Electric, Inc., and its alter ego and/or successor Midwest Electric & Retail Contractors, Inc., d/b/a MERC, Inc., and Asset Management Partners, Inc., a single integrated enterprise and single employer, and Edward L. Calvert, individually *and* International Brotherhood of Electrical Workers, Local Union No. 481, a/w International Brotherhood of Electrical Workers, AFL–CIO. Cases 25–CA–028283–1 Amended, 25–CA–028283–2 Amended, 25–CA–028283–4 Amended, 25–CA–028397–1 Amended, 25–CA–028398–1 Amended, 25–CA–028406, 25–CA–028532 Amended, 25–CA–028567, 25–CA–028582, and 25–CA–028637 Amended

November 8, 2012

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HAYES AND GRIFFIN

On December 20, 2011, Administrative Law Judge Ira Sandron issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief, the Acting General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the supplemental decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[1] findings,[2] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board orders that the Respondent, E.L.C. Electric Inc.; its alter ego and successor Midwest Electric & Retail Contractors, Inc., d/b/a MERC, Inc.; its alter ego, Asset Management Partners, Inc.; and Edward L. Calvert, an individual, their officers, agents, successors, and assigns, shall make whole the individuals named below by paying them the amounts set forth opposite their names, plus interest accrued to the date of payment, as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), minus tax withholdings required by Federal and State laws.

Benjamin Adair	$23,517
Matthew Aldrich	9,715
Todd Bailey	2,383
Ryan Chamber	19,231
Gregory Frazier	6, 610
Timothy Grow	46,439
Mikalis Grunde	11,285
Ronald Hamilton	90,508
Mark Herche	3,049
Benjamin Mullins	3,049
Rory Navratil	1,399
Bruce Sanderson	73,823
Jonathan Trinosky	57,694
Jonathan White	18,055
Troy Whitaker	67,621
David Wilson	3,049
TOTAL	$437,427

Dated, Washington, D.C. November 8, 2012

Mark Gaston Pearce, Chairman

Brian E. Hayes, Member

Richard F. Griffin, Jr., Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[1] We deny the Acting General Counsel's request to strike portions of the Respondent's exceptions brief as asserting facts not in evidence. These additional facts, even if true, would not affect the result in this case.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. In light of the judge's credibility findings with respect to the Respondent's commingling of personal and corporate funds, we find it unnecessary to rely on the adverse inference drawn by the judge against the Respondent for failing to call Darlene Van Treese, a former bookkeeping employee of E.L.C. Electric, as a witness.

In addition, the Respondent asserts that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit.

Rebekah Ramirez and *Kimberly R. Sorg-Graves, Esqs.,* for the Acting General Counsel.

Edward L. Calvert, pro se. *Kevin Passman,* pro se. *Neil E. Gath, Esq. (Fillenwarth, Dennerline, Grath & Towe, LLP),* of Indianapolis, Indiana, for the Charging Party.

SUPPLEMENTAL DECISION AND ORDER

STATEMENT OF THE CASE

IRA SANDRON, Administrative Law Judge. This matter arises out of an amendment to compliance specification and notice of hearing issued on April 27, 2011, against E.L.C. Electric, Inc. (ELC), Midwest Electric & Retail Contractors, Inc. d/b/a MERC, Inc. (MERC), Asset Management Partners, Inc. (AM), and Edward Calvert, an individual. Calvert was ELC's sole owner and president, and AM's majority owner and president. Kevin Passman, formerly ELC's vice president of field operations, is MERC's sole owner.

I heard the underlying unfair labor practice (ULP) case on August 20–22 and November 4 and 5, 2003, and found that ELC had committed a number of violations of Sections 8(a)(1) and (3) of the Act, as well as engaged in conduct that warranted setting aside an election held on September 26, 2002. On July 29, 2005, the Board, for all relevant purposes, affirmed my decision.[1] On November 30, 2005, the Region issued a compliance specification and notice of hearing.[2] On July 20, 2006, the Acting General Counsel (the General Counsel) filed a motion for partial summary judgment, which the Board granted on September 28, 2006, in regard to 13 discriminatees but denied as to Benjamin Adair, Matthew Aldrich, and Ronald Hamilton.[3]

Pursuant to notice, I held a trial in Indianapolis, Indiana, from August 15–18 and on October 6, 2011, at which I afforded the parties full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. For the entire course of the trial, G. Thomas Blankenship of Indianapolis, Indiana, represented AM and Calvert as an individual. He and Calvert stated that Calvert was representing ELC. I later granted Attorney Blankenship's unopposed posttrial motion to withdraw. His stipulations and representations remain binding on Calvert.

Issues

At trial, Calvert and the General Counsel stipulated to the amounts owed to Adair, Aldrich, and Hamilton,[4] and the matter of the amount of backpay owed to all 16 discriminatees therefore is no longer in dispute. Rather, since ELC ceased business operations on about March 25, 2006, the overriding question for determination is who is now responsible for paying ELC's backpay liability?

The answer turns on resolving the following issues:

(1) Do ELC and AM constitute a single employer?
(2) Should the corporate veils of ELC and AM be pierced and Calvert found personally liable?
(3) Are MERC and ELC alter egos?
(4) Is MERC a *Golden State* successor to ELC?

Witnesses and Credibility

The General Counsel called Calvert and Passman as adverse witnesses under Section 611(c) of the Act; CPA Carol Schmidt, who was ELC's and Calvert's personal accountant for many years; and CPA Joseph Holt.

At the underlying ULP hearing in 2003, Calvert and Passman were among the witnesses for ELC. Calvert testified primarily on the reasons why he decided to lay off ELC's remaining electrical workers on March 14, 2003, and then utilized them as employees of labor providers. I found him to be a "patently unreliable witness" and that:

> His testimony . . . smacked of evasion, was replete with internal inconsistencies, and was frequently contradicted by other witnesses of the Respondent. Calvert demonstrated an attitude of defensiveness, sometimes crossing over into argumentative, and at times appeared to show a contemptuous indifference to providing responsive answers. [5]

ELC excepted to some of my credibility findings, but the Board affirmed them.[6]

I approached the present matter with an open mind as far as evaluating Calvert's credibility and not allowing my past conclusions to influence my judgment. That said, his testimony at this hearing suffered from the same defects as in 2003, the only exception being that his attitude was less confrontational. Thus, he regularly professed lack of recall or answered tentatively, even on matters concerning his current and recent situation. Several examples follow. Calvert still owns the building out of which ELC conducted business. Yet, when asked if the ELC computer is still there, he replied that he did not know.[7] When Calvert was asked if he ever had a landline phone for AM, he replied, "I'm not for sure whether I did or not. I may have. I'm not certain."[8] When the General Counsel asked when Calvert transferred ELC assets to himself in partial payment of personal loans he had made to ELC, he could not recall when, even whether it was before or after ELC ceased operations.[9] Finally, Calvert testified that he does not know if he still has or uses a bank credit card that he used for AM.[10]

Moreover, Calvert frequently had no answer for many questions, often merely responding that "the records" would show the information (when, in fact, they often did not). A few examples follow. Calvert could give no specific reason why he waited until April 2008 to auction off ELC equipment valued at approximately $127,000, when ELC had stopped doing business on about March 25, 2006.[11] Calvert made personal loans to AM, including loans in the amounts of $100,000 and $70,000 but testified that he did not know why AM needed so

[1] 344 NLRB 1200.
[2] GC Exh. 1(b).
[3] 348 NLRB 301.
[4] See GC Exh. 204. Attorney Blankenship allowed Calvert to enter into the stipulation but abstained, as counsel for Calvert and AM, from taking a position.
[5] 344 NLRB at 1213 (fn. omitted).
[6] Id. at 1200 fn.1.
[7] Tr. 444.
[8] Tr. 460.
[9] Tr. 526.
[10] Tr. 624.
[11] Tr. 532.

much money.[12] General Counsel's Exhibit 41 contains bank and other records that Calvert claimed showed his personal loans to ELC. He could not explain why one such record indicates three loans totaling $180,000 from an account in the names of his daughter Katrina Springer, son Kevin Calvert, and Tracy Calvert, or why he set up such an account.[13] When asked when he decided to close ELC, Calvert gave the very vague answer, "Sometime probably in 2005 . . . . Could have been the end of 2004."[14] In this regard, although he claimed that he decided to close ELC because it was losing money, he provided no documentation to substantiate that averment.

Further undermining Calvert's overall credibility was the fact that his business and personal records were, to put it charitably, haphazard. They were lacking in continuity and completeness and filled with cryptic notations that he made—many of which he was at a loss to explain at trial.

Additionally, on the last day of the hearing, Calvert attempted to claim that some of the records that his counsel had earlier stipulated were ELC business records were not in fact ELC's business records but instead personal records. Even after Attorney Blankenship reiterated his stipulation that the documents in question were ELC's business records, Calvert repeated that they were "personal records."[15]

Calvert also averred on the final day of trial that ELC still owes him at least $1.2 million,[16] the amount at which he arrived as of September 6, 2005, despite General Counsel's Exhibit 43 showing ELC repayments to him of over $420,000 after that date. He offered no documentation to support this testimony. As I will describe, his testimony concerning what happened to ELC equipment and vehicles valued at $127,000 in August 2005 was hopelessly contradictory and confusing.

Perhaps most damaging to Calvert's credibility was his professed ignorance of Passman's business operations and the reasons Passman requested loans—testimony that Passman, a myriad of documents of record, and even Calvert's own testimony directly contradicted.

General Counsel's Exhibit 9 is a composite exhibit of Calvert's bank statements for his personal equity line of credit. On several documents therein, he wrote the notation "MERC." Additionally, prior to ELC's cessation of operations in March 2006, Calvert noted on various documents that ELC business services be transferred to MERC and/or Passman.[17] General Counsel's Exhibit 135 at 1, dated October 17, 2005, and with the name "Midwest Electric & Retail Contractors" at the top of the first page, was a detailed checklist that Calvert made for Passman "when I found out that he was going in business. I sent set these things up to tell him, this is what you need to do."[18] On about January 10, 2006, Calvert sent letters to ELC's customers, informing them that he was retiring and closing ELC, and recommending that they use MERC for any future work.[19] In March 2006, Calvert admittedly allowed Passman to use Calvert's American Express card for MERC business "because he was just starting out," and Calvert notated that MERC was to be billed for certain expenses that Passman charged to the card in March 2006.[20] Finally, Calvert admitted at one point in his testimony that he "'probably" advised Passman how to go about forming his new company.[21]

Despite all of the above, Calvert testified—incredibly, and in conflict with Passman's testimony—that "I didn't make any loans to MERC. It was—any loans I made was [sic] to Kevin Passman."[22] When the General Counsel asked why he would have written in the notations "MERC" and "Midwest" on a September 2006 bank statement for his personal equity line,[23] his answer was totally unbelievable: "No. It's evidently just a mistake, because I never made any money—I never made any loan for MERC at all. I've made personal loans to Kevin Passman"[24] He also testified, incredibly, that he did not did not ask why Passman wanted the loans, did not know for what the money was used, and that he was simply "helping him out as a friend, as a personal friend."[25]

Calvert was also contradicted by CPA Schmidt. Thus, as subsequently described, her testimony did not gibe with Calvert's claim that she was responsible for separating his personal expenses from ELC's expenses, in terms of his credit card charges and otherwise. In this regard, Calvert testified a number of times that he relied on CPA's and his bookkeepers to properly separate his personal expenses and ELC business expenses in ELC's records, and to otherwise handle his personal and business accounts—testimony that neither Schmidt nor any other ELC CPA or bookkeeper corroborated.

Finally, Calvert did not call his wife Linda, daughter Katrina, or son Kevin to corroborate his testimony, to testify on matters about which they had personal knowledge, or to offer an explanation of why certain documents on their face clearly suggest that ELC, AM, and his other companies were under Calvert's complete control and direction, with almost no practical distinction between themselves and Calvert operating as an individual. I therefore draw an adverse inference that their testimony would not have supported and, indeed, might have harmed Calvert's position. See *International Automated Machines,* 285 NLRB 1122, 1122–1123 (1987), enfd. 861 F.2d 720 (6th Cir. 1988) ("[W[hen a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge."). Similarly, I draw an adverse inference against Calvert for not having called Darlene Van Trish, ELC's long time bookkeeper, to testify since he failed to offer any evidence that he tried unsuccessfully to locate her.

[12] Tr. 557.
[13] Tr. 485–486. See GC Exh. 41 at 46.
[14] Tr. 669.
[15] Tr. 856.
[16] Tr. 870.
[17] E.g., GC Exhs. 162, 164.
[18] Tr. 763.
[19] GC Exh. 139.
[20] Tr. 452; GC Exh. 64 at 5, 9.
[21] Tr. 672–673.
[22] Tr. 558.
[23] GC Exh. 9 at 17.
[24] Tr. 558–559.
[25] Tr. 560, 598.

For all of the above reasons, I once again find Calvert's testimony patently unreliable.

Passman—who did not have the benefit of counsel—seemed sincere and to answer questions without hesitation. I credit him where his testimony conflicted with Calvert's, including his testimony that Calvert offered to loan him start-up money to open his own company and that he later requested loans from Calvert specifically to keep MERC operating.

Schmidt, whom the General Counsel subpoenaed, was clearly displeased at having to be a witness. Nonetheless, she seemed candid and to answer questions readily and without an attempt to slant her responses. Accordingly, I also credit her where her testimony contradicted Calvert's.

Facts

I find the following facts based on the entire record, including testimony and my observations of witness demeanor, documents, stipulations, the posttrial briefs that the General Counsel and Calvert filed on December 12, 2011, and Passman's closing statement. I note that I cannot consider averments of fact in Calvert's brief that were not put in evidence, for example, statements on page 32 concerning his present financial status. I grant the General Counsel's unopposed motions to correct the transcript and to replace page 37 of General Counsel's Exhibit 41. On December 16, 2011, the General Counsel filed an errata or supplement to her brief, which added additional subheadings to the table of contents and provided a table of authorities. On December 19, 2011, Calvert filed an objection to the errata. However, I see no prejudice to either Calvert or Passman in allowing the errata, which simply expanded the table of contents but not the body of the General Counsel's brief, and added no new citations but merely listed them in table form. Accordingly, I accept it.

ELC, AM, Calvert, and other Calvert companies

Calvert did business as ELC and AM at 3960 Southeastern Avenue (Southeastern Avenue). Previously, the building was titled in the name of ELC, but Calvert and his wife Linda later purchased it, and it remains in their names today.

AM was incorporated on May 18, 2001, and dissolved in June 2009.[26] Calvert was 90–percent owner and sole officer. He testified that he formed AM to manage his and his wife's personal assets, including their rental properties, and to perform such functions as paying bills and depositing rental payments. After ELC ceased business, Calvert used AM to pay ELC's outstanding bills, including utilities. General Counsel's Exhibit 9 contains some of AM checks and deposits from March 2, 2005 through January 2, 2007. Calvert testified that the $100,000 deposit he made to AM on May 3, 2005, represented a loan but at first could offer no reason why AM needed so much money at the time.[27] Similarly, he could not answer why he made a $70,000 loan to AM on September 7, 2006.[28] In that period, AM made loans, inter alia, to Passman, Kevin Calvert, and an acquaintance of Kevin Calvert (in the amount of $70,000).

Calvert contended at trial that a number of recreational and entertainment expenses, such as golf outings, golf lessons, and lunches, were properly treated as business expenses because they generated business. Not being a CPA or expert in the nuances of the Internal Revenue Code, I will give him the benefit of the doubt on that matter.

Regardless, General Counsel's Exhibits 22 and 23 show that on a regular basis in 2006 and 2007, Calvert used AM checks to pay for his personal American Express credit card, which he conceded contained both personal and business charges.[29]

Retail Marketing & Consulting, Inc. (RMC) was another Calvert corporation, which was in existence by 2005. He testified that it was set up with the hope that he would be able to sell retail work of various kinds around the country; in other words, to act as a contractor. As with so many other matters, Calvert could not recall when RMC stopped doing business.[30]

RMC's employees were Calvert, his wife, his daughter-in-law, and his son in law. Occasionally, ELC performed electrical work that had been awarded to RMC, which did receive profits from ELC's work at Kmart projects. The only written instrument regarding the relationship between ELC and RMC was an unsigned and undated half-page "agreement" that Calvert handwrote.[31] He testified that he had "no idea" when he prepared it or even whether that was before or after ELC closed.[32] All of the jobs he subcontracted to Kmart were for electrical work. For out out of town jobs, he utilized local electrical companies. Calvert used ELC's credit card to purchase certain items for RMC, and then reimbursed ELC.

Calvert also established Red Lion Construction Services, of which he is the 100 percent owner, after he closed ELC and needed income. He envisioned picking up electrical and other work. It continues to exist but has had no employees or work.

ELC was incorporated on August 5, 1983, ceased doing business on about March 25, 2006, and was dissolved on March 17, 2009.[33] ELC has no current employees, assets, bank accounts, vehicles or business activity. Calvert never filed for bankruptcy for ELC. Calvert was sole owner and president, his wife was secretary, and Passman was vice president of field operations. However, Passman was an officer of ELC in name only, as reflected by his following testimony. Prior to the hearing, he never saw the resolution of January 1, 1993, wherein then sole director Calvert elected him vice president of field operations;[34] he was unaware that he had been elected vice

[26] GC Exh. 5.

[27] Tr. 557; GC Exh. 9 at 6. The next day, he testified sua sponte that it "could have been" for remodeling work done at Southeastern Avenue when USF was moving in as a new tenant. Tr. 574. However, this testimony was inconsistent with his testimony that USF's lease started in January 2004. Tr. 543.

[28] Tr. 557; GC Exh. 9 at 14.

[29] Tr. 628–629. He further testified that he assumed the accountants properly separated everything but then conceded that he really had "no idea" if they did so. Tr. 629.

[30] Tr. 593.

[31] GC Exh. 154 at 1.

[32] Tr. 728. Of course, if ELC had already closed, it could not have been party to an agreement. This illustrates Calvert's seeming lack of effort to answer questions as accurately as possible.

[33] See GC Exh. 50.

[34] GC Exh. 144 at 2. Linda Calvert was later made a director.

president of field operations; he never attended any meetings of ELC's board of directors; and he was never paid any dividends.

General Counsel's Exhibit 55 shows ELC's employees during the first quarter of 2006, the last quarter that it conducted business. They included Calvert; his wife, who handled receivables and payables and performed other office functions on a part-time basis, in both Calvert's and ELC's offices; his daughter Katrina; Passman; and Darlene Van Treese, who worked with CPA Schmidt and handled payables and purchases of office supplies in ELC's office on a full-time basis; Joshua Graham and Christine Rossittis (formerly Patterson), electricians; and Justin Glover and Jason Lucas, electrician's helpers. Of the nine other listed employees, eight were electricians or electrician's helpers, and one was a truckdriver.

ELC's last job was electrical work on a new Walmart store in Greenwood, Indiana (Walmart Greenwood), on which ELC employees worked through on about March 25, 2006. Prior to ELC's cessation of business, Calvert and Passman talked about Passman assuming the remaining work there, which was taking long than originally anticipated. On about January 10, 2006, Calvert sent letters to ELC's customers, informing them that he was retiring and closing ELC, and recommending that they use MERC for any future work.[35] I note that this effectively precluded ELC from obtaining any new jobs.

General Counsel's Exhibit 15 is a list of 18 vehicles that ELC had as of April 8, 2002. One was assigned to Calvert for his own use, one to his wife, and one to Passman. What ultimately happened to all of them is unclear from the record. At a June 22, 2005 meeting of the ELC Board of Directors, attended by Calvert, his wife, and Attorney Blankenship, Calvert and his wife voted that certain ELC equipment and vehicles (trailers and bed trucks) be transferred to them as partial repayment of their loans to ELC.[36] Those item were later valued at $127,000 on about August 22, 2005, and at a directors' meeting on September 2, 2005, again attended by Calvert, his wife, and Attorney Blankenship, Calvert and his wife voted that such assets be transferred to them retroactively to July 1, 2005, and the amount that ELC owed to them be reduced by $127,000.[37]

Calvert testified that some of those vehicles were later titled to AM and then sold. He was uncertain whether AM or he as an individual held title to them before their sale and where the proceeds went, illustrating the difficulty in separating Calvert's business operations from him as an individual. His conflicting testimony makes it impossible to know when such transfer occurred. Thus, he testified that the same equipment and vehicles were still ELC's at or shortly before its closure (on about March 25, 2006), and he was uncertain when those items were transferred to him—even whether it was before or after ELC closed.[38] However, at another point, he testified that he believed that those items were among those sold at an auction of ELC assets held on about April 28, 2008, at which virtually everything was sold.[39] Calvert could give no specific reason for why the auction was held more than 2 years after ELC ceased operations.[40] In any event, he later purchased two of the trucks, which he currently maintains at the Southeastern Avenue warehouse. He occasionally drives one of them.

On about September 6, 2005, Calvert prepared a list of the loans that he and his wife had made to ELC, totaling slightly over $1,231,000.[41] General Counsel's Exhibit 43 shows ELC repayments to Calvert of over $420,000 after September 6, 2005. He testified that his loans to ELC and ELC's repayments went back and forth, depending on the status of ELC funds. He equivocated on whether he has records showing all of his loans to ELC.[42] In any event, no formal business records were prepared or maintained to document the loans or their repayments.

All of the documentation of the loans that he produced for trial is contained in General Counsel's Exhibit 41. They reflect personal loans from his and his wife's index account, credit line account, home equity loan, and refinancing of Southeastern Avenue. I note that General Counsel's Exhibit 41 at 46, 47 blurs the distinction between Calvert and his family members regarding ELC. Thus, the account from which $200,000 was presumably loaned to ELC in April 2005 was not an account in Calvert's or his wife's names, but rather was in the names of his son Kevin, daughter Katrina, and Tracy Calvert. Calvert wrote that he deposited all of the $230,000 from his home equity line into his account "set up at 5th 3rd Bank in my son's name. From this account I wrote (3) check [sic] to ELC (loaned money)." (Emphasis in original). Calvert was unable to give a reason for why he did this.[43]

Calvert admitted that he used ELC checks to pay for his and his wife's credit cards, on which they charged both personal and business expenses.[44] Thus, Calvert used ELC checks to pay his American Express credit card, which contained both personal and business expenses, in 2003, 2004, 2005, and 2006, with one payment as high as $10,344.07 in October 2005, and the last payment ($3,301.73) in March 2006.[45] He also used ELC checks to pay for his Citibank credit card charges, which included personal as well as business expenses.[46] Calvert furnished no records showing that he ever reimbursed ELC for what it paid for his and his wife's personal charges. In March 2006, Calvert wrote two ELC checks to pay Katrina Stringer for "some money that I owed her."[47] He did not offer an explanation of how that repayment related to ELC.

Calvert claimed that Schmidt reviewed the charges on a monthly basis and differentiated personal and business expenses, but she contradicted this assertion, testifying that she never separated any of Calvert's personal expenses from ELC's business expenses in ELC's books. Instead, her involvement was limited to answering any questions from ELC's bookkeepers, the last of whom for many years was Van Treese. Schmidt

[35] GC Exh. 139.
[36] GC Exh. 41 at 20.
[37] Id. at 1.
[38] Tr. 523, 526.
[39] Tr. 531. See GC Exh. 40.
[40] Tr. 532.
[41] GC Exh. 41 at 23–24.
[42] Tr. 469–470, 480 790.
[43] Tr. 485.
[44] Tr. 447, 450, 667, 836–837.
[45] See GC Exh. 176.
[46] See GC Exhs. 63–65 (2003–2006 statements).
[47] Tr. 842; see GC Exh. 208 at 18.

could not recall any specific questions. She emphasized that she did not prepare audits per se or financial statements in the legal sense for ELC; rather, she prepared journal entries or non-disclosure compilations based on information that ELC provided to her.

On one occasion, in December 2005, ELC paid a $5,262.48 bill to a heating and air conditioning company for work it had performed for Katrina Springer. Calvert testified that he advanced the money and had ELC pay him "as partial repayment" of the loans he had made to ELC.[48]

ELC and Calvert as an individual, were parties to a lease effective January 1, 2000, through December 31, 2010, with a yearly rental of $72,187.68, payable monthly.[49] ELC was to pay all of the utilities for the building, which has common meters. On one occasion, in December 2004, Calvert paid his Southeastern Avenue monthly mortgage payment of $2,015.64 with an ELC check that he made out to himself.[50] Calvert testified that ELC stopped making rent payments in 2004 or 2005.

Calvert's son Kevin was a partner in USF Worldwide (USF), whose lease at Southeastern Avenue started on January 2004 or approximately May 2005, depending on which portion of Calvert's testimony is credited. USF was delinquent in rent payments at the time it vacated the premises, and Calvert has never sought to collect any arrearages or penalties. However, Kevin Calvert is still a tenant, being half-owner of the company (not USF) that now leases Southeastern Avenue, including ELC's old space, and pays $7,000 a month rent. In fact, Calvert asked MERC to move out because his son's company needed more space. Kevin Calvert has also had a company named Calvert Communications, but the record does not reflect if this company is Calvert's tenant.

MERC

Passman testified at the underlying ULP proceeding in 2003 as ELC's vice president of field operations. By letter of February 7, 2006, sent to MERC in care of Passman, the Region stated that it had information that MERC was contemplating operating as a successor to ELC and that ELC was a party–respondent to litigation with the NLRB. The letter went on to inform him of the outstanding compliance specification and notice of hearing regarding ELC, enclosed a copy thereof, and advised him that "the potential backpay liability at issue is substantial."[51]

In late 2005, Calvert told Passman that ELC was going to close and that Passman could either work for someone else or start his own company; if Passman chose the latter, Calvert would help him out by loaning him some money "to get started."[52] In approximately October 2005, shortly after their conversation, Passman decided to start his own business. He discussed business names with Calvert but decided on MERC on his own. As reflected by General Counsel's Exhibit 135, Calvert advised Passman on how to how to set up the new business.

Passman incorporated Midwest Electric & Retail Contractors, Inc. on December 2, 2005, when he was still employed by ELC, and he conducts business under the name of MERC, Inc.[53] He is the sole owner and officer. He is on salary, as is his wife Rose, who performs administrative duties on a full-time basis. In addition to drawing a salary, Passman has received dividends from MERC, most in the amounts of $1000, $2000, or $3000.[54] Those dividends declined to two in 2009 and three in 2010, as a result of dwindling revenues. He has also made personal loans to MERC and then reimbursed himself.

MERC prior to ELC's closure on about March 25, 2006

Passman did not do any paid advertising for MERC when he began operations. Rather, he contacted industry acquaintances that he had made through ELC, and by letter or phone communicated to vendors or customers that he had formed MERC. As earlier noted, Calvert sent out letters to customers in January 2006, informing them that ELC was going out of business and recommending MERC.

While he was still an ELC employee, Passman on February 16, 2006, entered into a subcontract agreement between MERC and Steiner Construction Services, LLC.[55] He had prepared the underlying bid using ELC office equipment. In February 2006, MERC did a job for USF.[56] Passman made a proposal that MERC continue and finish ELC's Walmart Greenwood work but was not awarded the job.

Calvert and Passman entered into a 10-year lease agreement on January 1, 2006, Calvert on behalf of AM and Passman on behalf of MERC.[57] The monthly rent of $10,000 included utilities, with late payments to be charged a five percent late fee . At the time, MERC had no revenues, and ELC was still in operation. Passman leased two of ELC's office spaces and 10,000 square feet, including "furnished offices, fax machine, copy machine, computers, printers, warehouse, truck dock, private rest rooms, break room, and 2 acres of fenced area for construction equipment." No furniture or equipment list was made part of the lease. During the first quarter of 2006, both ELC and MERC operated out of the same address. Passman purchased his own supplies but used ELC's equipment and furniture.

The ELC warehouse contained electrical and other materials, as well as various vehicles. The lease agreement did not say anything about MERC's use of ELC's vehicles or stored materials. According to Passman, those items were subject to "just kind of a gentlemen's agreement . . . "[58] that Calvert would let Passman use them on a temporary basis without charge. Passman used the ladders in the warehouse, but not the lifts. Ini-

[48] Tr. 538; GC Exh. 43 at 15.
[49] GC Exh. 45.
[50] GC Exh. 47 at 5–7.
[51] GC Exh. 82 at 1. Passman responded by letter of February 14, 2006. Id. at 2.
[52] Tr. 227.
[53] See GC Exh. 75.
[54] See GC Exh. 124.
[55] See GC Exh. 89.
[56] See GC Exh. 88, which reflects that MERC continued to do work for USF after ELC closed.
[57] GC Exh.11.
[58] Tr. 151.

tially, Katrina Stringer served as MERC's notary, but Passman then utilized his branch bank for such service.

As General Counsel's Exhibit 77 reflects, Passman first used electrical employees in mid-February 2006. They did electrical service calls. In February and March 2006, he employed five individuals who had worked for ELC: Beck, Glover, Graham, Lucas, and Rossittis. In February and March 2006, Graham and, possibly Rossittis, worked for both ELC and MERC simultaneously.

Passman purchased the rights to use certain software specific to the industry that ELC had used, first paying for it in January 2006, when he was still an ELC employee and ELC was still in operation and had employees.

MERC after ELC's closure

MERC occupied two of the six or seven ELC office spaces, which were on the right side of the building. All of ELC's office equipment was in place when ELC closed, and Passman used the same computer and software, printer, photocopier, desk, and chairs. Later, Calvert auctioned off the contents of the other spaces, and Passman paid him for MERC's office equipment.

Passman obtained a new phone number and fax number for MERC but continued using the ELC equipment. He also continued to have possession of the cell phone that ELC had provided to him as an ELC employee. The cell phone number remained the same, but Passman paid for it after ELC closed. Calvert and Passman orally agreed that Passman could continue to use his ELC American Express card, paying for the charges he incurred, until he was able to establish his own account. No fixed time limit was set. Passman was still using the card for MERC business at least into mid-2007.[59] At all times since he started MERC, Passman has used National City Bank (later PNC) for all of his banking needs, including a business line of credit, whereas Calvert had his accounts at Fifth Third Bank.

After ELC had closed, Passman took ELC materials from the warehouse for MERC's use. He sent payment to AM, based on his determination of the prices of various items from talking with suppliers. General Counsel's Exhibit 19(b) at 5 is a list of equipment that ELC used in early 2006, some of which MERC used and Passman later purchased. Other items were sold by auction in 2008.

ELC had 18 vehicles in early 2006.[60] Two were specifically assigned to Calvert, and one to Passman. After ELC closed, MERC used two of the trucks and, occasionally, two of the other vehicles. MERC did not pay for their use. Calvert and Passman orally agreed that Passman could use the ELC vehicles without payment until he was able to obtain his own. In a phone conversation prior to February 2, 2006, Calvert and Passman agreed that MERC would start paying insurance on the vehicles, but the agreement was never reduced to writing. Passman started paying such insurance on April 1, 2006.[61] On August 13, 2007, Passman purchased the two trucks and their accessories from Calvert for $16,000.[62] MERC currently uses three vehicles, two of which were among those ELC owned in early 2006.

MERC payroll records for the period ending December 3, 2007, list Graham and Rossittis, as well as Zachary Culp and Brian Ferguson, electrical helpers, who had not worked for MERC.[63] In 2007, MERC employed two other employees to perform electrical work, neither of whom had worked for ELC (Michael McKinney and Jason Moss).

Graham and Rossittis continue to work for MERC as electricians. They are MERC's only current employees, excluding Passman and his wife. Until recently, MERC also employed Passman's son, Devin, on a part-time basis.

For contracted temporary labor, MERC used All Trades for a long period of time on a regular basis, [64] as well as National Construction; at present, it uses Commercial Trades Service. ELC "frequently" used All Trades Staffing, Inc. (All Trades) and National Construction Work Force for such temporary labor.[65]

MERC's main suppliers for electrical materials have been All-Phase Electric, Central Supply, and Allied Wholesale; and for rental equipment, United Rentals. ELC also used All-Phase Electric and United Rentals.

In April 2006, MERC performed a job for Ryder Truck.[66] ELC had made a proposal for the work in July 2005, but the scope of the job later changed. Another early MERC job was for CJM Contractors,[67] for which ELC had not performed work. MERC again performed work for CJM in February 2008.

ELC had performed a considerable amount of work for K-Mart, which MERC continued to do until K-Mart purchased Sears, which then did most of K-Mart's electrical work in-house. For K-Mart jobs, MERC bid on and performed different kinds of work, including painting, floor repair, and electrical. After ELC closed, MERC did ELC's repair warranty work and then billed AM. After about a year in business, MERC started doing garage door work, although nothing in the record shows its volume.

Passman was often past due on monthly rent payments, but Calvert never charged him a late fee. Thus, Passman made no rent payments for at least the first few months, and MERC was never able to pay in full the lease payments as per the lease agreement. At some point prior to September 2008, in light of Passman's nonpayment of rent, Calvert and Passman orally agreed that Passman would reimburse Calvert for finance charges on his personal credit line. At another point, Passman told Calvert that he could no longer make lease payments, Calvert replied that he could stay, and Passman offered to contribute $500 a month toward utilities. Calvert has never sought to collect the unpaid rent or delinquency fees.

[59] See GC Exh. 17 at 54.
[60] See GC Exh. 15 at 1.
[61] See GC Exh. 95 at 3.
[62] GC Exh. 46.
[63] See GC Exh. 77 at 4.
[64] See GC. Exh. 111.
[65] Tr. 428. See GC Exh. 57 (All Trades records).
[66] See GC Exh. 90 at 16.
[67] See GC Exh. 92.

General Counsel's Exhibit 10 reflects a number of loans from Calvert to Passman, totaling $157,500. After the first loan, the normal practice was for Passman to let Calvert know when he needed additional money for MERC, Calvert would let him know when he had the money, and Calvert would then meet him at the office to sign. All of the promissory notes were due a year from their execution and provided for eight–percent interest until maturity.

The first, for $5000, was dated November 30, 2005. Passman testified that his loan was made "to help get my business started"[68]—directly contradicting Calvert's unbelievable testimony that all of the loans were personal to Passman and that Calvert did not know they were for MERC.

Passman signed subsequent promissory notes, totaling $152,500, as follows:

January 5, 2006 – $5,000
March 2 – $10,000
March 29 – $10,000
June 12 – $7,500
July 11 – $10,000
September 22 – $10,000
November 7 – $40,000
December 14 – $15,000
December 20 – $15,000
May 14, 2007 – $30,000

When MERC made revenues, Passman repaid Calvert. He ultimately paid all of the promissory notes back on or before their due dates. However, Passman never paid any interest on them, even though they provided for such.

As of when Passman moved out of the building, in about July 2010, Calvert maintained an office on the left side of the building, as did Katrina Stringer, and Kevin Calvert had an office on the second floor and operated as USF. Passman now operates MERC out of his residence.

CONCLUSIONS

Calvert, ELC, and AM

From the above, certain conclusions are abundantly clear, taking into account Calvert's lack of reliability as a witness and his incomplete and informal record-keeping. Calvert did not establish that he had a bona fide business reason for deciding to close ELC at the time that he did so. He testified vaguely that it was because ELC was losing money. However, he provided no documentation that ELC was doing worse in late 2005 or early 2006 than in prior years and, indeed, he was uncertain when he made the decision to close ELC, testifying that it might have been in 2004, in which case one has to wonder why he waited over a year to initiate the process of going out of business. Moreover, Calvert took affirmative actions in early 2006 to foreclose ELC from obtaining further work, as reflected in his letters to existing customers in January 2006, telling them that he was going out of business and recommending MERC for their future jobs.

Calvert had sole and total control of ELC and AM, which he operated at his unfettered discretion in a freewheeling manner. He transferred funds from company to company and between his companies and himself and his family members (wife, daughter, and son), to the point where distinctions between his corporate and personal accounts were for all practical purposes meaningless. ELC (and AM, as well, based on this record) were corporations in name only, with no functional existence separate and apart from Calvert. This is best reflected by the fact that Passman was never even informed that he was elected vice president of ELC in 1993.

Because Calvert was not a credible witness and his "business" records were so informal and incomplete, knowing what happened to all of the assets ELC had before Calvert began implementing a phase out of its operations is impossible. Clearly, however, a certain portion of them has gone to Calvert and his family members: from the auction in 2008, repayment of Calvert's loans, transfer of Southeastern Avenue from ELC to Calvert and his wife, and checks to Kevin Calvert and Katrina Stringer. I note again that none of Calvert's family members testified and therefore failed to rebut what appears to have been disbursements of ELC funds to them unrelated to ELC's business operations. In sum, an indeterminate but apparently substantially amount of ELC's assets remain with Calvert and his family.

ELC and AM as a single employer

In determining whether two nominally separate employing entities constitute a single employer**,** the Board examines four factors: (1) common ownership, (2) common management, (3) interrelationship of operations, and (4) common control of labor relations. No single factor is controlling, and all not need to be present. Rather, single-employer status depends on all of the circumstances and is based ultimately on the absence of an arms-length relationship between seemingly independent companies. *Mercy Hospital of Buffalo,* 336 NLRB 1282, 1283–1284 (2001); *Dow Chemical Co.,* 326 NLRB 288, 288 (1998).

Based on my above factual findings, I conclude that all four criteria have been met and that ELC and AM were inseparable from the person of Calvert. Therefore, I conclude that ELC and AM constituted a single employer.

Calvert's Personal Liability

The Board will pierce the corporate veil and impose personal liability for backpay on a now defunct corporation's owners/officers when (1) there is such unity of interest and lack of respect given to the separate identify of the corporation by its shareholders, that the personalities and assets of the corporation and the individuals are indistinct; and (2) adherence to the corporate form would sanction a fraud, promote injustice, or lead to an evasion of legal obligations. *A. J. Mechanical,* 352 NLRB 874 (2008), enfd. mem. sub nom. *Greene v. NLRB,* 321 Fed.App. 816 (11th Cir. 2009) (unpublished); *White Oak Coal Co.,* 318 NLRB 732, 732 (1995), enfd. 81 F.3d 150 (4th Cir. 1996).

When assessing the first prong, the Board considers (1) the degree to which the corporate legal formalities have been maintained, and (2) the degree to which individual and corporate funds, other assets, and affairs have been comingled. *White*

[68] Tr. 183.

Oak Coal, ibid at 735. Commingling, treatment of corporate assets as one's own, and undercapitalization often constitute the most serious forms of abuse of the corporate entity. *D.L. Baker*, Inc., 351 NLRB 515, 522 (2007).

In finding piercing of the corporate veil appropriate, the Board in *White Oak Coal* concluded: (318 NLRB at 735)

In short, the Deels failed to maintain an arm's-length relationship between themselves and the related corporate entities under their control. In these circumstances, we find such unity of interest, and lack of respect given by the Deels to the separate corporate entities, that the personalities and assets of these corporations and the Deels effectively have been blurred.

The Board further concluded that that "[t]he natural, foreseeable, and inevitable consequence" of the Deels' conduct was "the diminished ability of the corporate alter egos to satisfy [the Respondent's] statutory remedial obligations." Ibid.

Such conclusions are warranted here. Both ELC and AM had no practical existence outside of the person of Calvert, who controlled their operations at will and used them for both business and personal purposes, as he himself admitted. Thus, the first prong of the test is satisfied. As for the second prong, I am convinced from this record that Calvert has sought to evade his legal obligations to pay the backpay owed to the 16 discriminatees. He effectively sabotaged ELC's business, funneled an apparently significant portion of its assets into other enterprises and/or his or his family members' personal funds, and effectively established MERC and kept it operating. Allowing him to shirk his backpay obligation by such conduct would work a manifest injustice and be untenable.

Accordingly, I conclude that the corporate veils of ELC and AM should be pierced and Calvert be held personally liable for the backpay.

MERC

As ELC's Alter Ego

The Board generally will find an alter-ego relationship when two entities have substantially identical management, business purposes, operations, equipment, customers, supervision, and ownership. *McCarthy Construction,* 355 NLRB 50, 51 (2010). Not all of these indicia need to be present, and on one of them is a prerequisite to finding an alter-ego relationship. Ibid. Unlawful motivation is not a necessary element of an alter-ego finding, but the Board does consider whether the purpose behind the creation of the suspected alter ego was to evade responsibilities under the Act. Ibid; *Diverse Steel, Inc.,* 349 NLRB 946, 946 (2007); *Fallon-Williams, Inc.,* 336 NLRB 602 (2001). I note that the Board has not hesitated to find alter-ego status when the owners were different but in a close familial relationship. *ADF, Inc.,* 355 NLRB 81, 83 (2010); *Fallon-Williams, Inc.,* ibid at 602.

A variety of factors support an alter-ego finding, the following in particular. First, MERC's primary type of work has been electrical, as was ELC's. In this respect, MERC's workforce, aside from Passman's wife and, possibly, his son, has at all times consisted of employees classified either as electricians or electrical helpers. Second, a majority of those employees have continuously been former ELC employees. Thus, all of MERC's first five employees in February and March 2006, including Graham and Rossittis, still worked or had worked for ELC, and Graham and Rossittis are MERC's only current employees, aside from Passman's wife. Third, at least at the beginning of MERC's operations, much of its work represented a continuation of ELC's work: MERC performed work for K-Mart, one of ELC's major customers, until K-Mart's purchase by Sears, and also did ELC's repair warranty work after ELC closed. Finally, MERC operated out of the same address as ELC until about July 2010 and used some of the same office and warehouse equipment and some of the same vehicles, either on a paid or unpaid basis.

As far as ownership, management, and supervision, Calvert has had no direct involvement in MERC. However, further analysis is required to determine how pivotal a role he played in MERC's establishment and operations.

Various facts establish that Calvert and Passman did not have an arms length business relationship when it came to MERC and that Calvert rendered him a degree of assistance that went far beyond the pale of normal business practice. Calvert allowed Passman to use ELC's vehicles without charge until Passman could afford to pay. Many of their agreements, for example, Passman's use of certain ELC's equipment, and materials, were merely verbal and never reduced to writing. Passman never paid Calvert the interest specified in the promissory notes for the loans totaling $157,500 that Calvert gave him. Calvert allowed Passman to remain a tenant at Southeastern Avenue even when he was far behind in his $10,000 monthly rent payments, and Calvert never sought to collect back rent. In sum, Calvert rendered considerable financial and other assistance to Passman without which MERC would never have been established or been able to survive as a viable business. The only reason that Calvert advanced on the record for his extraordinary largesse, in particular, his loans to Passman, was that Passman was a "friend." Especially when coming from a businessperson such as Calvert, who has had numerous companies over a period of many years, such an explanation wholly lacks credibility. The only logical explanation for Calvert's generosity toward Passman and MERC must be that it was part and parcel of his strategy to avoid financial liability for the ULP's that he committed as ELC's owner. I need not speculate on whether Passman was privy to this motive because the answer makes no difference as far as Calvert's motivation for sponsoring MERC.

I conclude that regardless of Passman's direct ownership and management of MERC, MERC's establishment and survival depended on Calvert, who used MERC as a means of evading ELC's obligations under the Act. I consider this another factor supporting a finding of alter ego.

Accordingly, I conclude that MERC is an alter ego of ELC.

Golden State Successor

To be a successor employer**,** the similarities between the two operations must manifest continuity between the enterprises, and a majority of its employees in an appropriate bargaining unit must be former bargaining unit employees of the predecessor. *NLRB v. Burns Security Services,* 406 U.S. 272, 280–281, 281 fn. 4 (1972). A number of factors must be examined:

whether the business of both employers is essentially the same; whether the employees of the news company are doing the same jobs in the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products, and basically has the same body of customers. *Fall River Dyeing & Finishing Corp. v. NLRB,* 482 U.S. 27, 43 (1987); *Aircraft Magnesium,* 265 NLRB 1344, 1345 (1982), enfd. 730 F.2d 767 (9th Cir. 1984). See also *Shares, Inc. v. NLRB,* 433 F.3d 939, 943 (7th Cir. 2006); *Bloedorn v. Francisco Foods, Inc.,* 276 F.3d 270, 289 (7th Cir. 2001). To "a substantial extent," the applicability of *Burns* turns on whether the new employer made a conscious decision to maintain generally the same business and to hire a majority of its employees from the predecessor. *Fall River Dyeing* at 40–41; *Francisco Foods* at 288.

As the Seventh Circuit Court of Appeals has held, a finding of continuity of operation does not require that the old and new operations be identical; rather, the test is whether employees "perform[ ] largely the same tasks, under comparable conditions, and under a number of the same supervisors." *Shares, Inc*. at 944, citing *Bloedorn* at 289. Moreover, the old and new jobs must be compared from the employees' perspective. Ibid.

Based on the facts that I set out under my alter-ego analysis above, and Passman's continuity as a supervisor as per *Shares, Inc.*, I conclude that MERC was a successor employer to ELC.

In *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973), the Supreme Court held that a successor employer under *Burns* can be charged with notice of an outstanding Board order against his predecessor and held liable for the unremedied ULP's. See also *S. Bent & Brothers,* 336 NLRB 788, 790 (2001). The burden is on the successor to establish that he did not have notice thereof. *Bent* at 790, *Robert G. Andrew, Inc.,* 300 NLRB 444, 444 (1990); *NLRB v. Jarm Enterprises,* 785 F.2d 195, 199 (7th Cir. 1986).

Here, there is no question that Passman had actual notice of the Board's Order against ELC, from the Regional Office's February 7, 2006 letter and its attachments, which expressly warned of potentially substantial backpay liability. This was prior to ELC's closure and while Passman was simultaneously an ELC employee and beginning operations as MERC.

Accordingly, I further conclude that MERC is a *Golden State* successor to ELC.

Therefore, my ultimate conclusion is that all of the named respondents are subject to liability for ELC's ULP's. In light of this determination, I need not decide the General Counsel's further contention that ELC and MERC constitute a single employer.

ORDER

I Hereby Order that E.L.C. Electric, Inc.; its alter ego and successor, Midwest Electric & Retail Contractors, Inc., d/b/a Merc, Inc.; its alter ego, Asset Management Partners, Inc.; and Edward L. Calvert, an individual, their officers, agents, successors, and assigns shall jointly and severally pay the individuals named below the amounts following their names (computed through August 31, 2011), plus interest accrued to the date of payment in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), minus tax withholdings required by Federal and state laws.[69]

Benjamin Adair	$23,517
Matthew Aldrich	9,715
Todd Bailey	2,383
Ryan Chambers	19,231
Gregory Frazier	6,610
Timothy Grow	46,439
Mikalis Grunde	11,285
Ronald Hamilton	90,508
Mark Herche	3,049
Benjamin Mullins	3,049
Rory Navratil	1,399
Bruce Sanderson	73,823
Jonathan Trinosky	57,694
Jonathan White	18,055
Troy Whitaker	67,621
DavidWilson	3,049
Total	$437,427

Dated, Washington, D.C. December 20, 2011

[69] Although the General Counsel requests compound interest (GC Br. at 100), the Board has determined that such remedy is not applicable to cases that were in the compliance stage prior to the issuance of *Kentucky River Medical Center*, 356 NLRB No. 8 (2010. Rome *Electrical Systems, Inc.,* 356 NLRB No. 38, slip op. at 1 fn. 2 (2010).

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Everett McKinley Dirksen United States Courthouse
Room 2722 - 219 S. Dearborn Street
Chicago, Illinois 60604

Office of the Clerk
Phone: (312) 435-5850
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ORDER

July 23, 2013

Before

JOEL M. FLAUM, *Circuit Judge*

No.: 13-1952	NATIONAL LABOR RELATIONS BOARD, Petitioner and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION, NO. 481, Intervening Petitioner v. E.L.C. ELECTRIC, INC., its alter ego and successor MIDWEST ELECTRIC & RETAIL CONTRACTORS, INC., doing business as MERC, INC., its alter ego ASSET MANAGEMENT PARTNERS, INC., and EDWARD L. CALVERT, an individual, their officers, agents, successors and assigns Respondents
Originating Case Information:	
Agency Case Nos: 25-CA-28283-1, 25-CA-28283-2, 25-CA-28283-4, 25-CA-28397-1, 25-CA-28398-1, 25-CA-28406, 25-CA-28532, 25-CA-28567, 25-CA-28582 & 25-CA-28637 National Labor Relations Board	

Upon consideration of the **MOTION OF THE NATIONAL LABOR RELATIONS BOARD TO AMEND THE COURT'S ORDER ENFORCING THE BOARD'S SUPPLEMENTAL ORDER**, filed on June 27, 2013, by counsel for the petitioner,

IT IS ORDERED that the motion is **GRANTED**. This court's June 20, 2013, order is **AMENDED** to read as follows: "IT IS ORDERED that the application is GRANTED and the National Labor Relations Board's Supplemental Order as modified by the Board's May 31, 2013, Order is ENFORCED."

SO ORDERED: December 21, 2015.

James M. Carr
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

IN RE:	)	
	)	
EDWARD LEE CALVERT,	)	Case No. 13-13079-JMC-7A
	)	
Debtor.	)	
	)	
NATIONAL LABOR RELATIONS BOARD,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Adversary Proceeding No. 15-50001
	)	
EDWARD LEE CALVERT,	)	
	)	
Defendant.	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

THIS MATTER came before the Court for a bench trial on September 23, 2015. Plaintiff National Labor Relations Board ("NLRB") appeared by counsel William R. Warwick, III and Dalford Dean Owens, Jr. Defendant Edward Lee Calvert ("Calvert") appeared *pro se*.

The Court, having reviewed the evidence presented at trial, the *Joint Stipulation of Facts* filed by Calvert and the NLRB on September 16, 2015 (Docket No. 46), the *Pre-Trial Brief of the National Labor Relations Board* filed on September 17, 2015 (Docket No. 47) (the "NLRB's Trial Brief"), the *Pre-Trial Brief of Defendant, Edward Lee Calvert, Pro Se* filed on September 18, 2015 (Docket No. 49), and the other matters of record in this adversary proceeding; having heard the presentations at trial; and being otherwise duly advised, now enters the following findings of fact and conclusions of law as required by Fed. R. Civ. P. 52, made applicable to this adversary proceeding by Fed. R. Bankr. P. 7052, consistent with its statements on the record at the conclusion of the trial.

Findings of Fact

Calvert and the NLRB have jointly stipulated to the following facts:[1]

1. On July 29, 2005 the National Labor Relations Board issued a Decision and Order reported at *E.L.C. Elec., Inc.*, 344 NLRB 1200 (2005).

2. On September 28, 2006 the National Labor Relations Board issued a Decision and Order reported at *E.L.C. Elec., Inc.*, 348 NLRB 301 (2006).

3. On November 8, 2008 the National Labor Relations Board issued a Decision and Order reported at *E.L.C. Elec., Inc., & Its Alter Ego &/or Successor Midwest Elec. & Retail Contractors, Inc., d/b/a MERC, Inc., & Asset Mgmt. Partners, Inc., A Single Integrated Enter. & Single Employer, & Edward L. Calvert, Individually*, 359 NLRB No. 20 (Nov. 8, 2012).

4. On June 20, 2013, the Seventh Circuit issued a judgment, which it amended on July 23, 2013, enforcing the NLRB's 2012 order, in case *National Labor Relations Board v. E.L.C. Electric, Inc., et al.* 7th Cir. No. 13-1952.

[1] Except where noted by brackets, these stipulated facts (findings 1 through 9) are included verbatim, with no adjustment to account for typographical errors or terms defined elsewhere herein.

5. On January 28, 2014, in connection with this bankruptcy [case], Edward Calvert testified at the first creditor meeting.

6. On April 24, 2014, in connection with this bankruptcy [case], and pursuant to Rule 2004, Edward Calvert was deposed by an attorney of the of the National Labor Relations Board.

7. On August 14, 2014, in connection with this bankruptcy [case], and pursuant to Rule 2004, Edward Calvert was deposed by an attorney of the of the National Labor Relations Board.

8. On December 9, 2014, in connection with this bankruptcy [case], and pursuant to Rule 2004, Edward Calvert was deposed by an attorney of the of the National Labor Relations Board.

9. On November 19, 2012, in relation to a prejudgment writ of garnishment proceeding in United States District Court for the Southern District of Indiana, Edward Calvert was deposed by an attorney of the National Labor Relations Board.

The Court makes the following additional findings of fact:

10. On August or September 26, 2002,[2] an election (the "Election") was held in a unit of electricians employed by E.L.C. Electric, Inc. (the "Company"), of which Calvert was owner and president.

a. Prior to the Election, Calvert knew that certain employees of the Company were trying to organize.

[2] The testimony of Calvert (elicited by leading question) and the July 29, 2005 decision of the NLRB set forth different dates for the conduct of the Election.

b. Prior to the Election, Calvert knew a bargaining unit would be delineated, encompassing the employees of the Company who would be eligible to vote in the Election. Calvert knew that supervisors and temporary employees could not vote in the Election.

c. Prior to the Election, Calvert campaigned against the union, which he understood was his right, because he wanted the Company to be union-free. Calvert sent at least two letters to Company employees explaining why he wanted the Company to remain union-free.

d. At the time of the Election, Calvert knew that federal law gave the employees the right to try to organize a union at the Company.

11. The union lost the Election.

12. The union filed objections to the Election. Pursuant to the charges filed by the union, the NLRB issued a complaint alleging that the Company had violated § 8(a)(1) and (3) of the National Labor Relations Act ("NLRA"). On April 7, 2004, the administrative law judge (the "ALJ") issued a decision that the Company had violated § 8(a)(1) and (3) of the NLRA. On July 29, 2005, the NLRB affirmed the ALJ's rulings, findings and conclusions as modified, adopted the recommended Order as modified, and adopted the ALJ's recommendation that the Election be set aside and a new election held.

a. Calvert understood that some of the employees who had left the Company based on the Company's violations of the NLRA and were then working for union contractors would be included in the bargaining unit for the second election.

13. Other remedies were also ordered, including back pay awards, with respect to the Company's violations of the NLRA. By Supplemental Decision and Order dated November 8, 2012, the NLRB affirmed the ALJ's December 20, 2011 rulings, findings and conclusions, adopted the recommended order, and ordered the Company, its alter ego and successor Midwest

Electric & Retail Contractors, Inc., d/b/a MERC, Inc., its alter ego, Asset Management Partners, Inc., and Calvert, their officers, agents, successors and assigns, to pay $437,427 plus interest to 16 individuals, an amount that was stipulated to by Calvert.

14. On or about March 14, 2003, well before the NLRB's decision to set aside the Election and hold a new election but apparently after the NLRB issued on December 23, 2002 a report on challenged ballots and objections, order consolidating cases, order directing hearing, and notice of hearing, the Company promoted some employees in the bargaining unit to management positions and laid off 13 employees in the bargaining unit. (Three employees had been laid off earlier in 2003.) The Company offered to assist the laid-off employees with transitioning to a labor provider.

a. Calvert understood, by virtue of the layoffs, that the Company no longer had certain obligations with respect to the former employees, such as the Company was not obligated to pay them or provide various benefits such as health insurance, vacation pay, holiday pay, or 401(k) matching contributions if available.

b. Calvert understood, by virtue of the layoffs, that the Company had no "rank-and-file" employees who could form a bargaining unit to organize a union.

c. When asked if Calvert believed there would be a union going forward, he answered that he did not know.

15. Calvert testified that the Company laid off the employees to save money associated with common wage project audits.

a. At the time, the Company was working on several common wage (also called prevailing wage) projects such as schools and hospitals. At some point, it seemed to Calvert that the Indiana Department of Labor was auditing the Company on each such project.

The audit process cost the Company money and manpower and would "inevitably" (according to Calvert) find a problem, such as the Company did not pay the right wage rates or benefits because the employees were wrongly classified by job type. Because of this difficulty, the Company chose to use temporary help through labor providers.

b. Under this new model, the Company would negotiate a rate with the labor provider which would include wages, benefits, state and federal taxes, insurance, etc., and the labor provider, not the Company, would be responsible for the Indiana Department of Labor audit on any future common wage project. According to Calvert, this decision "saved the company a ton of money."

c. The Company sent a letter dated March 7, 2003 explaining the transition to each of the Company's employees.

d. The NLRB presented no evidence to contradict Calvert's testimony.

16. On at least two occasions during the trial, counsel for the NLRB, on its direct examination of Calvert, affirmatively declined to question Calvert's intent:

> I want to move ahead now to the spring of 2003 and I'm going to ask you some questions about the lay-off of employees. And I want to be clear, **I'm not asking you why you did it**. I just want to get some facts into the record about what happened. Transcript, 33:9-13 (emphasis added).
>
> Mr. Calvert, that actually didn't answer my question. **My question was not what your mindset was**. It was, at the time that you eliminate all of these bargaining unit employees, there was not a possibility there could be a union election -- . Transcript, 37:2-5 (emphasis added).

17. The only exchange on the NLRB's direct examination of Calvert regarding intent was as follows:

> Q So at the time you laid all these employees off, you thought there would not -- there would no longer be a union election.
>
> A I didn't have that in my mind.

THE COURT: Say that again, sir. What did you just say?

THE WITNESS: I said I did not have that in my mind.

THE COURT: Did not have that in your mind.

THE WITNESS: No.

Q Mr. Calvert, that actually didn't answer my question. My question was not what your mindset was. It was, at the time that you eliminate all of these bargaining unit employees, there was not a possibility there could be a union election --

A I'd say probably no.

Q -- because that was your belief.

A It wasn't my belief.

Q I know you're not -- no. Well --

A Are you asking me for my belief?

Q Yeah.

A I didn't say that was my belief. I just said I didn't lay them off for that reason. You're trying to get my belief to say that that's why I laid the people off, because so I wouldn't have a union. That was not my intent.

Q But you did transfer 13 employees to temporary --

A No, sir. I did not transfer them.

Q But you laid them off.

A I laid them off.

Q And you promoted the employees you retained to supervisor.

A Whatever the record says, I don't remember at this time exactly who even I promoted or why they were promoted. But it was probably a combination of my thoughts, Kevin Passman's thoughts of who to keep and who not to keep.

Q Okay.

THE COURT: Kevin Passman -- how do we spell that name?

THE WITNESS: P-A-S-S-M-A-N.

THE COURT: P-A-S-S --

THE WITNESS: -S-S-M-A-N.

THE COURT: -- M-A -- Passman?

THE WITNESS: Yeah. He was the vice president of ELC Electric, that had been --

THE COURT: All right.

THE WITNESS: -- with me some 20-some years.

THE COURT: All right.

Q So you didn't believe there would be a union election going forward, not that, that was your motivation. Now, please, to be clear, you did not believe there would be a union going forward.

A I didn't know.

Q But you knew you had no bargaining unit employees.

A Some time, I may have hired somebody else.

Q But at that time, you had no bargaining unit employees.

A At that time, when I laid everybody off, I did not have anyone that would fit the description of a bargaining employee.

Q Okay. Thank you, Mr. Calvert. …

Transcript, 36:17-38:23.

18. A second election was not held.

19. On or about December 17, 2004, Debtor signed a letter to the Company's employees outlining changes to its benefit programs effective January 1, 2005. The letter cited the Company's "difficult financial times" as a justification, including "harassment from the IBEW union and their counterparts the NLRB".

20. On or about March 25, 2006, the Company closed.

21. On December 19, 2013 (the "Petition Date"), Calvert filed a voluntary petition under chapter 7 of the United States Bankruptcy Code, 11 U.S.C. §§ 101 *et seq*. (the "Bankruptcy Code"),[3] his schedules and statement of financial affairs.

22. Of the $300,247.26 scheduled as the total value of Calvert's personal property, $274,000 was accounts receivable with the account debtor being Calvert's son, Kevin Calvert ("Kevin"). Calvert testified that $274,000 represents one-half of the amount he and his wife loaned to Kevin, and that Kevin owed another $274,000 to Calvert's wife.

a. Calvert and/or his wife loaned Kevin more than $548,000[4] during 2008, 2009 and 2010. Calvert testified at trial that he and his wife loaned Kevin money starting in 2006 when Kevin was without a job and running through 2010 or 2011. Calvert testified that there were or should have been promissory notes for each loan showing the amount of the loan, the date of the loan, and the terms of the loan, signed by Kevin and him, but that the folder he kept of the original promissory notes was lost.

b. This trial testimony contradicted three different amounts – approximately $340,000 between January 1, 2009 and August 12, 2012, $376,000, and $318,658 – that Calvert testified he and his wife loaned to Kevin during an August 14, 2004 deposition.

c. Calvert has not produced the signed promissory notes to the chapter 7 trustee of Calvert's bankruptcy estate (the "Trustee") or the NLRB. Calvert printed from his computer copies (unsigned) of the notes and gave them to the NLRB and/or Trustee.

---

[3] All statutory references hereinafter are to the Bankruptcy Code unless otherwise noted.

[4] Calvert testified that a portion of this amount is attributable to Calvert and/or his wife reimbursing Kevin for health insurance that Kevin provided for Calvert and his wife.

d. On February 13, 2015, Trustee initiated an adversary proceeding captioned *Petr v. Calvert*, Adversary Proceeding No. 15-50034, against Kevin seeking a judgment of more than $548,000 plus interest relating to Calvert's loans to Kevin, which Trustee alleged, among other things, were fraudulent transfers. Trustee's allegations were resolved via a settlement that the Court approved on July 6, 2015 (Bankruptcy Case Docket No. 157). Pursuant to the terms of the settlement, Kevin will pay $150,000 to Calvert's bankruptcy estate over the course of two years. In the event of a default in payment, Trustee would submit to the Court an Agreed Judgment in the amount of $300,000. Trustee represented to the Court that he believes, (a) "that the proposed settlement is fair and equitable under the circumstances by avoiding uncertain, lengthy and costly litigation which, if successful, would be followed by protracted and expensive proceedings to recover any judgment amount against Kevin"; (b) "in the reasonable exercise of his business judgment, that the proposed settlement is in the best interests of the estate and the creditors"; and (c) that the settlement "represents a fair and appropriate compromise in light of the factors and considerations presented." (*See* Bankruptcy Case Docket No. 156, ¶¶ 7, 9, 10.) No party in interest, including the NLRB, filed a timely objection to the settlement motion.

23. On January 28, 2014, at the § 341 first meeting of creditors, Calvert testified that his only income was derived from social security and rental income. His responses to item 1 (income from employment or operation of business) and item 2 (income other than from employment or operation of business) on the statement of financial affairs showed social security, rental income, tax refunds, an IRA distribution, and a loan against a life insurance policy.

a. His 2013 tax return shows business income of $17,072, which Calvert testified was from his consulting activities. Calvert worked, issued invoices and got paid in 2013 and 2014 for consulting work that he performed separate and apart from the listed sources of income.

b. Calvert issued consulting invoices under the name "Express Consulting" but did not list Express Consulting in response to item 18 (nature, location and name of business) on the statement of financial affairs. Calvert further testified that "Express Consulting" was a business his son had incorporated, and Calvert chose the wrong name.

c. Calvert testified that he does not consider the consulting income to be "business" income because he did not formally establish a company with the State of Indiana, e.g., he did not receive a certificate, he was not granted a license, he did not advertise, and he did not have a telephone line, stationery, accounting system, business cards and so forth. Calvert testified at trial that these projects were referred to him by long-time friends.

24. After the NLRB obtained a Court order, Calvert's account at Fifth Third Bank appears to have been garnished. Thereafter, Calvert closed such account and began to use his wife's account (the "Account") at Chase Bank. Calvert's income, including payments for Calvert's consulting work, and his wife's income were then deposited into the Account.

a. On Schedule B, item 2 (checking, savings or other financial accounts …), Calvert did not list his interest in the Account.

b. Calvert testified that the Account was not included because it is his wife's account and she is not part of the bankruptcy case.

25. Calvert received $10,000 on or about December 9, 2013 (10 days prior to the Petition Date) as payment for his consulting services, which was not reflected in the schedules or

statement of financial affairs. Calvert testified that he had spent such money pre-petition to pay bills. Calvert testified at trial that he thought what he had (in terms of assets) on the Petition Date was all that had to be included in the bankruptcy papers.

26. As of September 23, 2015, after applying two involuntary payments against the amounts owed, the outstanding amount of the debt owed by Calvert is $458,249.00 plus excess tax amounts to account for such liability that the individuals to whom the back pay is owed would incur by receiving the back pay and interest in a lump sum.

Conclusions of Law

The Court makes the following conclusions of law:

1. Any finding of fact above will also be a conclusion of law, and any conclusion of law will also be a finding of fact to support the judgment of the Court.

2. This Court has jurisdiction in this matter pursuant to 28 U.S.C. §§ 1334 and 157.

3. This adversary proceeding is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I).

4. Venue is proper in this matter pursuant to 28 U.S.C. §§ 1408 and 1409.

5. As more fully described in the *Entry on Motion for Summary Judgment* entered September 1, 2015 (Docket No. 39), the claims against Calvert have been liquidated in the NLRB proceedings (with Calvert's and his counsel's participation) and the Court will give preclusive effect to the amount of the debt.

§ 523(a)(6)

6. Exceptions to discharge under § 523 "are to be [construed] strictly against a creditor and liberally in favor of the debtor." *Goldberg Sec., Inc. v. Scarlata (In re Scarlata)*, 979 F.2d 521, 524 (7th Cir. 1992) (quoting *In re Zarzynski*, 771 F.2d 304, 306 (7th Cir. 1985)).

"The burden is on the objecting creditor to prove exceptions to discharge." *Id.* (citation omitted). The burden of proof required is a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279, 291, 111 S.Ct. 654, 661, 112 L.Ed.2d 755 (1991).

7. A debt "for willful and malicious injury by the debtor to another entity or to the property of another entity" is excepted from discharge pursuant to § 523(a)(6). "Bankruptcy courts in [the Seventh Circuit] have focused on three points: (1) an injury caused by the debtor (2) willfully and (3) maliciously." *First Weber Group, Inc. v. Horsfall*, 738 F.3d 767, 774 (7th Cir. 2013) (citations omitted).

8. Injury "is understood to mean a 'violation of another's legal right, for which the law provides a remedy.' The injury need not have been suffered directly by the creditor asserting the claim. The creditor's claim must, however, derive from the other's injury." *Id.* (internal citations omitted).

9. "Willfulness requires 'a deliberate or intentional *injury*, not merely a deliberate or intentional *act* that leads to injury.' " *Id.* (quoting *Kawaauhau v. Geiger*, 523 U.S. 57, 61, 118 S.Ct. 974, 140 L.Ed.2d 90 (1998) (emphasis in original)). " 'Willfulness' can be found either if the 'debtor's motive was to inflict the injury, or the debtor's act was substantially certain to result in injury.' " *Id.* (quotation omitted).

10. Maliciousness requires the debtor to act "in conscious disregard of one's duties or without just cause or excuse; it does not require ill-will or specific intent to do harm." *In re Thirtyacre*, 36 F.3d 697, 700 (7th Cir. 1994) (quotation omitted). The Seventh Circuit reaffirmed its definition of maliciousness from *Thirtyacre* as good law. *Horsfall*, 738 F.3d at 774-75.

11. The NLRB asserted (and has the burden of proving) that "Calvert willfully and maliciously injured his employees when he terminated them for exercising rights guaranteed to

them by the National Labor Relations Act, and thereafter arranged to employ them indirectly, through labor brokers, so that he could avail himself of their skills without having to contend with their exercising their federally protected rights under the National Labor Relations Act." NLRB's Trial Brief, p. 6. Calvert disagrees.

12. With respect to an "injury," it is established, based on Calvert's testimony, that his decision to promote or lay off all of the Company's bargaining-unit employees prevented them from exercising their legal right to organize or not to organize at the Company under the NLRA.

13. Likewise, with respect to "willful," it is established, based on Calvert's testimony, that he understood that there were no bargaining-unit employees who could exercise their legal right to organize or not to organize at the Company once they were laid off or promoted. This is sufficient to establish willfulness as described in *Horsfall* because "[Calvert's] act was substantially certain to result in injury."

14. With regard to maliciousness, the Court is contending with two competing reasons for the layoffs/promotions: (i) the NLRB's position that Calvert acted "in conscious disregard" of the organization rights of the Company's employees; or (ii) Calvert's "just cause or excuse" to save the Company money.

a. Calvert testified that he switched to temporary help from labor providers to avoid costly audits by the Indiana Department of Labor on common wage projects. The NLRB presented no evidence (testimony or documentary) refuting Calvert's testimony (a) that the Company had been audited, (b) that the Company incurred costs responding to those audits, or (c) that the audits revealed issues.

b. The record with respect to what Calvert knew at the time he made the decision to layoff/promote the employees is somewhat unclear. The Election, which the union lost, was conducted during the fall before Calvert made the decision. Calvert apparently knew before he made the decision that the union had challenged the Election. However, Calvert did not know that a second election would be ordered because the ALJ's decision, and the affirmance thereof by the NLRB, were not issued until 2004 and 2005, respectively. Calvert's testimony revealed uncertainty:

> Q So you didn't believe there would be a union election going forward, not that, that was your motivation. Now, please, to be clear, you did not believe there would be a union going forward.
>
> A I didn't know.

(Transcript, 38:13-17). This appears to be substantiated by the fact that the ALJ's and the NLRB's decisions were not issued until more than one year and two years, respectively, thereafter. The NLRB did not present evidence from which the Court can conclude that, at the time the decision was made, it was more likely than not that Calvert consciously disregarded the organization rights of the Company's employees when Calvert presented uncontroverted evidence of a legitimate business reason for the layoffs/promotions.

15. Therefore, because the Court must construe exceptions to discharge strictly against the NLRB and liberally in favor of Calvert, the Court concludes that the NLRB did not prove by a preponderance of the evidence that Calvert acted maliciously. The debt owed by Calvert is NOT excepted from discharge pursuant to § 523(a)(6).

§ 727(a)(3) and (4)

16. Section 727 provides, in relevant part:

(a) The court shall grant the debtor a discharge, unless –

> (3) the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case;
>
> (4) the debtor knowingly and fraudulently, in or in connection with the case –
>
> (A) made a false oath or account;
> (B) presented or used a false claim;
> (C) gave, offered, received, or attempted to obtain money, property, or advantage, or a promise of money, property, or advantage, for acting or forbearing to act; or
> (D) withheld from an officer of the estate entitled to possession under this title, any recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs; … .

17. "Consistent with the 'fresh start' policy underlying the Code, these [§ 727(a)] exceptions to discharge should be construed strictly against the creditor and liberally in favor of the debtor. It is also important, however, to recognize that a discharge in bankruptcy is a privilege, not a right, and should only inure to the benefit of the honest debtor." *Matter of Juzwiak*, 89 F.3d 424, 427 (7th Cir. 1996) (internal citations omitted). "The denial of discharge is a harsh remedy to be reserved for a truly pernicious debtor." *Soft Sheen Prods., Inc. v. Johnson (In re Johnson)*, 98 B.R. 359, 367 (Bankr. N.D. Ill. 1988) (citation omitted). The grounds for denial of discharge under § 727(a) must be established by a preponderance of the evidence. *Peterson v. Scott (In re Scott)*, 172 F.3d 959, 966–67 (7th Cir. 1999).

§ 727(a)(3)

18. "The purpose of § 727(a)(3) is 'to make the privilege of discharge dependent on a true presentation of the debtor's financial affairs.' " *Id.* at 969 (quoting *Cox v. Lansdowne (In re Cox)*, 904 F.2d 1399, 1401 (9th Cir. 1990)). As a precondition to discharge, debtors are required to "produce records which provide creditors 'with enough information to ascertain the debtor's financial condition and track his financial dealings with substantial completeness and accuracy

for a reasonable period past to present.' " *Juzwiak*, 89 F.3d at 427 (quotations omitted). "Records need not be kept in any special manner, nor is there any rigid standard of perfection in record-keeping mandated by § 727(a)(3). On the other hand, courts and creditors should not be required to speculate as to the financial history or condition of the debtor, nor should they be compelled to reconstruct the debtor's affairs." *Id.* at 428 (internal citations omitted). Intent is not a requisite element for denying a discharge under § 727(a)(3). *Scott*, 172 F.3d at 969.

19. With respect to § 727(a)(3), the NLRB's sole focus is Calvert's failure to produce signed promissory notes documenting Calvert's and his wife's loans to Kevin, which are, according to the NLRB, absolutely necessary for it to "figure out exactly how much [Calvert] loaned his son and the precise character of these loans … ." Transcript, 91:16-19. Calvert testified that he lost the folder containing the original promissory notes, but he produced unsigned copies of the promissory notes that he printed from his computer.

20. As noted in Conclusion of Law § 18 above, Calvert's presentation of his financial affairs need not be perfect, but it had to provide enough information so that the NLRB did not have to guess at or reconstruct Calvert's financial affairs itself. Thus, the Court finds itself balancing the competing interests by deciding whether Calvert provided "*enough* information to ascertain the debtor's financial condition and track his financial dealings with *substantial* completeness and accuracy for a *reasonable* period past to present." *Juzwiak*, 89 F.3d at 427 (emphasis added). The following two reasons tip the scale in Calvert's favor:

a. A chapter 7 trustee is charged with investigating the financial affairs of a debtor (§ 704(a)(4)), and Trustee did so in Calvert's bankruptcy case. Trustee conducted a § 341 meeting of creditors, filed a report of possible assets (Bankruptcy Case Docket No. 58), motions to sell (Bankruptcy Case Docket Nos. 69 and 128), and an application to employ an

auctioneer/realtor (Bankruptcy Case Docket No. 117). Trustee initiated an adversary proceeding against Kevin (*see* Finding of Fact ¶ 22(d)) for the purpose of recovering money transferred by Calvert to Kevin, and ultimately settled the adversary proceeding with Kevin agreeing to pay a substantial amount of money to the bankruptcy estate. Trustee represented to the Court that the settlement was fair, equitable and in the best interest of the bankruptcy estate and creditors, and the NLRB did not object to the proposed settlement.

b. Moreover, as the Court addressed at the conclusion of the trial, the Uniform Commercial Code anticipates the loss of negotiable instruments (for example, *see* Ind. Code § 26-1-3.1-309), so the loss of the original promissory notes is not, in and of itself, dispositive.

21. Based on the circumstances of Calvert's bankruptcy case, it appears that, notwithstanding the loss of the original promissory notes, Trustee was able to ascertain Calvert's financial condition or business transactions with Kevin and act thereon. *See Schaumburg Bank & Trust Co., N.A. v. Hartford (In re Hartford)*, 525 B.R. 895, 909 (Bankr. N.D. Ill. 2015) ("the failure [to keep accurate records] appeared to have no bearing on the trustee's ability to administer the bankruptcy case … [t]he trustee was able to conclude the section 341 meeting, issue a report of assets, set a bar date and take other steps to administer the case"]. Therefore, strictly construing the exception to discharge against the NLRB, the Court declines to deny Calvert's discharge pursuant to § 727(a)(3).

§ 727(a)(4)

22. "The purpose of § 727(a)(4) is to enforce the Debtors' duty of disclosure and to ensure that the Debtors provide reliable information to those who have an interest in the

administration of the estate. *Stathopoulos v. Bostrom (In re Bostrom)*, 286 B.R. 352, 359 (Bankr. N.D. Ill. 2002) (citations omitted).

23. In order to prevail, the NLRB must establish five elements: "(1) [Calvert] made a statement under oath; (2) the statement was false; (3) [Calvert] knew the statement was false; (4) [Calvert] made the statement with the intent to deceive; and (5) the statement related materially to the bankruptcy case." *Id.* (citation omitted).

> 24. To find the requisite degree of fraudulent intent, the court must find that the debtor knowingly intended to defraud or engaged in such reckless behavior as to justify a finding of fraud. Direct evidence of intent to defraud may not be available. Instead, intent may be inferred from circumstantial evidence or by inference based on a course of conduct. Reckless disregard means "not caring whether some representation is true or false ... ." If a debtor's bankruptcy schedules reflect a "reckless indifference to the truth" then the plaintiff seeking denial of the discharge need not offer any further evidence of fraud.

Trennepohl v. Neal (In re Neal), 2009 WL 684793 at *2 (Bankr. S.D. Ind. 2009) (internal citations omitted).

25. "[A] fact is material 'if it bears a relationship to the debtor's business transactions or estate, or concerns the discovery of assets, business dealings, or the existence and disposition of the debtor's property.' " *Stamat v. Neary*, 635 F.3d 974, 982 (7th Cir. 2011) (quotation omitted).

26. The NLRB focuses on the omission of three items from Calvert's schedules and/or statement of financial affairs: (a) the Account because it was held in his benefit, (b) a consulting business that he operated prior to the Petition Date, and (c) business income, particularly $10,000 he was paid within ten days or so of the Petition Date; and alleged false testimony at the § 341 meeting of creditors when Calvert testified that his only sources of income were rental income and social security. *See* NLRB's Trial Brief, pp. 8-10. Calvert denies that he had a consulting "business" and argues that the $10,000 spent pre-petition was not an asset on

the Petition Date. With regard to the Account, he did not list it because it is his wife's account and she is not part of his bankruptcy case.

27. The Court concludes that the NLRB has established elements (1), (2), and (5) with respect to each of the three omissions.

28. However, the Court concludes that the NLRB has not established elements (3) and (4) by a preponderance of the evidence.

a. Calvert clearly has, at minimum, an equitable interest in the Account. He used it as his personal bank account even though his name was not on it. The Account should have been scheduled. However, his testimony undercuts the notion that the Account was omitted deceptively, and the NLRB has presented no evidence regarding Calvert's "reckless indifference to the truth" or a course of conduct that allows the Court to draw a different inference based thereon.

b. Calvert's "consulting business" should have been disclosed. The lack of formalities does not change its status as a "business," as sole proprietorships continue to be a valid and recognized business form. Likewise, the $10,000 of income derived from Calvert's consulting business should have been disclosed in addition to the rental income and social security benefits he was receiving. It is irrelevant that the income was inconsistent because it was earned through business-related activities. However, the Court cannot conclude that Calvert had deceptive intent regarding the business or the $10,000 payment. Calvert testified that he did not disclose the consulting business because it was not a "formal" business in his view, and that he did not disclose the $10,000 because it had been spent prior to the Petition Date. The Court concludes that the NLRB did not meet its burden of proof because it presented no direct or circumstantial evidence that allows the Court to draw a different conclusion.

29. The Court acknowledges that a common thread running through the omissions seems to be Calvert's reliance on "formalities" – e.g., his name was not on the Account; his wife was not a joint debtor in the bankruptcy case; he had not formally established a consulting business with the State of Indiana. This common thread is not sufficient to establish a course of conduct that provides circumstantial evidence of Calvert's intent on its own. The Court looked to substantiate this possible course of conduct through Calvert's "reckless indifference" to the truth or a lack of care about whether the schedules and statement of financial affairs were accurate, and it simply could not find substantiating evidence to conclude that Calvert's intent in omitting that information was to deceive.

30. Therefore, because the Court finds that the omissions were not made "knowingly and fraudulently," the Court declines to deny Calvert's discharge pursuant to § 727(a)(4).

Decision

Based on the foregoing, the Court hereby concludes that:

a. Calvert is entitled to a judgment that the debt owed by Calvert to the NLRB is not excepted from discharge pursuant to § 523(a)(6); and

b. Calvert is entitled to a judgment that Calvert's discharge will not be denied pursuant to § 727(a)(3) or (a)(4).

The Court will enter judgment consistent with these findings of fact and conclusions of law contemporaneously herewith.

# # #

SO ORDERED: December 21, 2015.

James M. Carr
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

IN RE:	)	
	)	
EDWARD LEE CALVERT,	)	Case No. 13-13079-JMC-7A
	)	
Debtor.	)	
	)	
NATIONAL LABOR RELATIONS BOARD,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Adversary Proceeding No. 15-50001
	)	
EDWARD LEE CALVERT,	)	
	)	
Defendant.	)	

JUDGMENT

Trial on this matter was held on September 23, 2015. Plaintiff National Labor Relations Board ("NLRB") appeared by counsel William R. Warwick, III and Dalford Dean Owens, Jr.

Defendant Edward Lee Calvert ("Calvert") appeared *pro se*. At the conclusion of the trial, the Court announced its preliminary decision on the record subject to further refinement.

In accordance with the written Findings of Fact and Conclusions of Law entered contemporaneously herewith, it is HEREBY ORDERED, ADJUDGED AND DECREED that judgment be and hereby is entered in favor of Calvert and against the NLRB on the allegations of the complaint. The debt owed by Calvert is DISCHARGEABLE, and Calvert's discharge is NOT DENIED pursuant to 11 U.S.C. § 727(a)(3) or (4).

# # #

SO ORDERED: December 21, 2015.

James M. Carr
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

IN RE:	)	
	)	
EDWARD LEE CALVERT,	)	Case No. 13-13079-JMC-7A
	)	
Debtor.	)	
	)	
NATIONAL LABOR RELATIONS BOARD,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Adversary Proceeding No. 15-50001
	)	
EDWARD LEE CALVERT,	)	
	)	
Defendant.	)	

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# # #

Official Form 416D (12/15)

United States Bankruptcy Court

Southern District Of Indiana

In re	Edward Lee Calvert, Debtor Address: 1406 Harmony Trail Greenfield, IN 46140 Last four digits of SSN: 4884	Case No. 13-13079 Chapter 7
	National Labor Relations Board, Plaintiff Edward Lee Calvert, Defendant	Adv. Proc. No. 15-50001

Notice of Appeal

Official Form 417A (12/15)

NOTICE OF APPEAL AND STATEMENT OF ELECTION

Part 1: Identify the appellant(s)

1. Name(s) of appellant(s): National Labor Relations Board

2. Position of appellant(s) in the adversary proceeding or bankruptcy case that is the subject of this appeal:

For appeals in an adversary proceeding.

- ☒ Plaintiff
- ☐ Defendant
- ☐ Other (describe) _____

For appeals in a bankruptcy case and not in an adversary proceeding.

- ☐ Debtor
- ☐ Creditor
- ☐ Trustee
- ☐ Other (describe) _____

Part 2: Identify the subject of this appeal

1. Describe the judgment, order, or decree appealed from: NLRB v. Calvert, 15-50001 (2015)

2. State the date on which the judgment, order, or decree was entered: December 21, 2015

Part 3: Identify the other parties to the appeal

List the names of all parties to the judgment, order, or decree appealed from and the names, addresses, and telephone numbers of their attorneys (attach additional pages if necessary):

1. Party: National Labor Relations Board Attorney: William R. Warwick, III & Dalford D. Owens, Jr.
Contempt, Compliance, & Special Litigation Branch
1015 Half Street, S.E., 4th Floor
Washington, D.C. 20003 T: (202) 273-3849

2. Party: Edward Lee Calvert Attorney: Edward Lee Calvert
1406 Harmony Trail
Greenfield, IN 46140

Part 4: Optional election to have appeal heard by District Court (applicable only in certain districts)

If a Bankruptcy Appellate Panel is available in this judicial district, the Bankruptcy Appellate Panel will hear this appeal unless, pursuant to 28 U.S.C. § 158(c)(1), a party elects to have the appeal heard by the United States District Court. If an appellant filing this notice wishes to have the appeal heard by the United States District Court, check below. Do not check the box if the appellant wishes the Bankruptcy Appellate Panel to hear the appeal.

- ❑ Appellant(s) elect to have the appeal heard by the United States District Court rather than by the Bankruptcy Appellate Panel.

Part 5: Sign below

William R. Warwick

Digitally signed by William R. Warwick
DN: cn=William R. Warwick, o=NLRB, ou=CCSLB, email=william.warwick@nlrb.gov, c=US
Date: 2016.01.19 12:47:38 -05'00'

Signature of attorney for appellant(s) (or appellant(s) if not represented by an attorney)

Date: January 19, 2015

Name, address, and telephone number of attorney (or appellant(s) if not represented by an attorney):

William R. Warwick, National Labor Relations Board
Contempt, Compliance, and Special Litigation Branch
1015 Half Street, S.E., 4th Floor
Washington, D.C. 20003 T: (202) 273-3849

Fee waiver notice: If appellant is a child support creditor or its representative and appellant has filed the form specified in § 304(g) of the Bankruptcy Reform Act of 1994, no fee is required.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

NATIONAL LABOR RELATIONS BOARD,	)	
Appellant,	)	
vs.	)	No. 1:16-cv-00161-SEB-MJD
EDWARD LEE CALVERT,	)	
Appellee.	)	

ORDER ON BANKRUPTCY APPEAL

Presently before the Court is an appeal by the National Labor Relations Board ("NLRB") [Docket No. 1], filed on January 20, 2016, challenging the decision of the Bankruptcy Court issued on December 21, 2015. For the reasons detailed below we AFFIRM the Bankruptcy Court's decision.

Factual Background

Debtor-Appellee Edward L. Calvert was the sole owner and president of ELC Electric Inc. (the "Company"), an electrical contracting company operating in the Indianapolis area. In July 2002, the International Brotherhood of Electrical Workers, Local 481 (the "Union") sought to become the certified bargaining representative for the Company's rank-and-file electricians. An election to determine whether a majority of the electricians desired to be represented by the Union was scheduled by the NLRB for September 26, 2002. Prior to election, Calvert became aware that the rank-and-file

electricians were attempting to organize; thus, in anticipation of the upcoming election, Calvert launched a campaign against the Union's certification because he wanted the Company to remain union-free.

On September 26, 2002 the Union lost the election, failing to gain a majority of support from the electricians. Shortly thereafter, the Union filed objections with the NLRB alleging that the Company had engaged in conduct that unduly influenced the election results in violation of the National Labor Relations Act (the "Act"), 29 U.S.C. § 101, *et seq.*

Following the Union's loss in the September 2002 elections, but prior to any decision by the NLRB on the challenges to its results, in January, February, and March of 2003, the Company laid off sixteen of its bargaining-unit electricians and promoted the only two remaining electricians, leaving the Company with no rank-and-file workforce.

Calvert testified that he understood that by laying off the rank-and-file electricians, the Company would no longer have obligations to pay them or provide them with other benefits such as health insurance or retirement contributions. In addition, it was his understanding that the layoffs left the Company with no rank-and-file employees who could form a bargaining unit, but that, at the time he made the decision to lay off the electricians, he did not know whether there would be future attempts to unionize workers at the Company.

He testified further that the Company had laid off the employees to save money. Specifically, at the time of the layoffs, the Company was contracted for several

"prevailing wage projects" such as schools and hospitals for which the Indiana Department of Labor was conducting audits that were costing the Company money and manpower, and which would, according to Calvert, "inevitably" lead to the Department discovering a problem with the Company's payment of wages, provision of benefits, or classification of workers. As a result, the Company chose to shift its operations to the use of temporary workers, whereby the Company would contract with an outside labor provider, who would be responsible for the provision of wages, benefits, and taxes, and, most importantly, would be responsible for any further audits by the Indiana Department of Labor. According to Calvert, this decision "saved the Company a ton of money." Bankr. Dkt. 56 at 6. The Company sent each of the affected workers a letter explaining the decision on March 7, 2003, a week prior to the layoffs.

In response to the early 2003 layoffs, the Union filed additional charges with the NLRB alleging that, by discharging the entire rank-and-file workforce, the Company had unlawfully discriminated against its electricians for engaging in their statutorily-protected right to organize. Pursuant to the charges filed by the Union, the NLRB instituted administrative proceedings against the Company for alleged violations of §§ 8(a)(1) and (3) of the Act. A trial was conducted in Indianapolis before an Administrative Law Judge ("ALJ") appointed by the NLRB, and, on April 7, 2004, the ALJ issued a decision holding that the Company's actions had violated §§ 8(a)(1) and (3) of the Act. On July 29, 2005, the NLRB affirmed the ALJ's rulings, findings, and conclusions as modified,

adopted the recommended order as modified, and adopted the ALJ's recommendation that the September 26, 2002 election be set aside and a new election be held.

In reaching its conclusion that the Company, through unfair labor practices, had interfered with the election results, requiring that they be set aside and a new election be held, the NLRB found that the Company discriminatorily discharged all sixteen of its bargaining-unit employees and that Calvert had personally made the decision to discharge the Company's thirteen electricians on March 14, 2003.[1] The NLRB also found that Calvert's intent in discharging these employees was to thwart their pursuit of union representation, given that he continued to avail himself of their services after their termination by contracting with the labor contractors for whom they worked. The NLRB also noted that it was unpersuaded by Calvert's explanations for the Company's actions, finding instead that Calvert's actions were based on unlawful antiunion animus. The NLRB ordered the Company, its officers, agents, successors, and assignees, to make whole through the payment of backpay the sixteen employees who had been unlawfully discharged in violation of the Act.

On March 25, 2006, nearly eight months after the NLRB ordered the payment of backpay, the Company ceased operations, prompting the NLRB to conduct a subsequent proceeding intended to address who was to become responsible for paying the Company's backpay liability. On November 8, 2012, an ALJ issued a Supplemental

[1] The record does not reflect who made the decision to layoff three of the sixteen bargaining-unit employees in January and February 2003, only that Calvert, as president, made the decision on March 14, 2003 to either promote or layoff the remaining rank-and-file workers.

Decision and Order finding that Calvert had created new corporate identities for the express purpose of avoiding the Company's liability for payment under the NLRB's original order, that the new corporate identities were alter-egos of the Company, and that Calvert had disregarded the separateness of the corporations and comingled and diverted funds in order to "evade his legal obligations to the backpay owed to the 16 discriminatees." Tr. Ex. 4 at 15. The ALJ held that the corporate veil should be pierced and Calvert should be held personally liable for $437,427 in backpay and interest to be paid to the sixteen discharged employees. The Order was modified, affirmed, and enforced by the Seventh Circuit on July 23, 2013. Tr. Ex. 5.

Five months thereafter, on December 19, 2013, Calvert filed a Chapter 7 bankruptcy petition seeking discharge of his debts. In response, the NLRB initiated the present adversary proceeding seeking to have its claim for the unsatisfied payment of backpay adjudicated as nondischargeable pursuant to 11 U.S.C. § 523(a)(6) and to have Calvert deemed ineligible for discharge pursuant to 11 U.S.C. § 727(a)(3) and (4).

On June 5, 2015, the NLRB moved the Bankruptcy Court for entry of summary judgment on grounds that its § 523(a)(6) claim for nondischargeability, which requires a showing of willfulness, deliberate injury, and malice, had been fully adjudicated in the NLRB's unfair labor practice proceedings and therefore the Bankruptcy Court should rely on the findings and conclusions in the NLRB's Decision and Order. The Bankruptcy Court denied the motion on September 1, 2015, holding that "the level of '*mens rea*' required for a determination of nondischargeability is not the same with respect to an

unfair labor practice determination under §8(a) of the National Labor Relations Act." Bank. Dkt. 39 at 4–5. Accordingly, the Bankruptcy Court held that the finding of antiunion animus in the NLRB decision did not necessarily compel a finding that Calvert had the subjective intent required by § 523(a)(6); however, the Bankruptcy Court held that any "specific findings" made by the ALJ with regard to Calvert's intent to cause injury to the electricians were entitled to preclusive effect under the doctrine of collateral estoppel, but upon review of the prior decisions, found that the NLRB adjudications lacked sufficient "specific findings" as to Calvert's intent so as to enable the Bankruptcy Court to give preclusive effect to the to the legal issues of liability and nondischargeability. The Bankruptcy Court held that it would instead analyze whether the facts proven at trial would support a conclusion of nondischargeability under § 523(a)(6) of the Bankruptcy Code.

A trial on the issue of nondischargeability was held on September 23, 2015, after which, on December 21, 2015, the Bankruptcy Court issued its Findings of Fact and Conclusions of Law, holding that, based on the evidence adduced at trial, Calvert's debt to the NLRB was not excepted from discharge pursuant to 11 U.S.C. § 523(a)(6). The Bankruptcy Court concluded: (1) that Calvert's decision to promote or lay off all of the Company's bargaining-unit employees prevented them from exercising their legal rights to organize under the NLRA and therefore caused a cognizable injury under § 523(a)(6); (2) that Calvert understood that there would be no bargaining-unit employees who could exercise their legal right to organize at the Company once they were all either laid off or

promoted and therefore he acted with requisite willfulness under § 523(a)(6); and (3) that Calvert's testimony that the Company switched to temporary employees from labor providers in order to avoid costly audits by the Indiana Department of Labor in confluence with the fact that he made the decision to switch to temporary employees more than a year prior to the ALJ's decision to set aside the first election's results and order a second election sufficiently refuted the NLRB's claim that, at the time the decision to lay off the workforce was made, it was more likely than not that Calvert consciously disregarded the organizational rights of the Company's employees. See Bankr. Dkt. 56 at 14–15, ¶¶ 12–14. Accordingly, construing the exception to discharge strictly against the NLRB and liberally in favor of Calvert, the Bankruptcy Court held that "the NLRB did not prove by a preponderance of evidence that Calvert acted maliciously. The debt owed by Calvert is NOT excepted from discharge pursuant to § 523(a)(6)." *Id.* at ¶ 15.

On January 20, 2016, the NLRB appealed the Bankruptcy Court's decision arguing that the NLRB's determination made in the underlying labor proceedings that Calvert had unlawfully discriminated against the bargaining-unit employees for exercising their statutory rights should be given preclusive effect with regard to the issue of whether Calvert had acted "in conscious disregard of [his] duties or without just cause or excuse." See Dkt. 10 at 9. The appeal became fully briefed on May 2, 2016, and is now ripe for decision by this Court.

Standard of Review

This Court has subject-matter jurisdiction to hear this appeal pursuant to 28 U.S.C. § 158(a)(1), which provides that "the district courts of the United States shall have jurisdiction to hear appeals (1) from final judgments, orders, and decrees." Pursuant to Fed. R. Bankr. P. 8013, the District Court may "affirm, modify, or reverse a bankruptcy judge's judgment, order, or decree or remand with instructions for further proceedings." In reviewing a bankruptcy court's judgment, questions of law are reviewed *de novo* and the bankruptcy court's findings of fact are reviewed for clear error. *In re Salem*, 465 F.3d 767, 773 (7th Cir. 2008).

Discussion

On appeal, the NLRB asks us to hold that the Bankruptcy Court erred in finding that the NLRB failed to prove by a preponderance of evidence that when Defendant-Appellee Calvert terminated his former employees he acted with the requisite malice to establish the nondischargeability of a debt pursuant to 11 U.S.C. § 523(a)(6).

For a debt to be nondischargeable pursuant to 11 U.S.C. § 523(a)(6), it must be the result of a "willful and malicious injury by debtor to another entity or to the property of another entity." The Seventh Circuit has defined "willful and malicious injury" as "one that the injurer inflicted knowing he had no legal justification and either desiring to inflict the injury or knowing it was highly likely to result from his act." *Jendusa-Nicolia v. Larson*, 677 F.3d 320, 324 (7th Cir. 2012). In analyzing whether a debt fits this description, bankruptcy courts within our Circuit focus on three points: (1) whether an

injury was caused by the debtor; (3) whether the debtor acted willfully; and (3) whether the debtor acted with malice. *First Weber Grp., Inc. v. Horsfall*, 738 F.3d 767, 774 (7th Cir. 2013). Throughout the analysis, the burden remains on the creditor (the NLRB) to establish these facts by a preponderance of evidence. *Id.*

Following a trial on this issue, the Bankruptcy Court found that Calvert's debt of $437,427 in backpay and interest to be paid to the sixteen discharged Company employees was the product of an injury to the employees, caused by Calvert, who acted willfully in causing the injury. See Bankr. Dkt. 56 at 14–15.The Bankruptcy Court declined the find, however, that the NLRB had proven by a preponderance of evidence that Calvert acted with the requisite malice in causing the injury, thereby satisfying the third prong of the § 523(a)(6) analysis and excepting the debt from discharge. *Id.* at ¶ 15.

The NLRB's primary argument on appeal is that the Bankruptcy Court failed to give appropriate preclusive effect to the underlying unfair labor practice proceedings in which the ALJ and NLRB determined that Calvert's company, ELC Electric Inc., had violated § 8(a) of the National Labor Relations Act. See Dkt. 10 at 11–14. At first blush it appears that the NLRB is appealing the Bankruptcy Court's legal conclusion contained within its order on summary judgment [Bankr. Dkt. 39] that, although the material facts presented in a nondischargeability adversary proceeding and an unfair labor practice proceeding may be similar, the level of *mens rea* needed to establish nondischargeability under § 523(a)(6) of the Bankruptcy Code is sufficiently distinct from that needed to prove an unfair labor practice under § 8(a) of the NLRA so as to require the Bankruptcy

Court to conduct its own analysis of dischargeability under § 523(a)(6), notwithstanding a prior determination of liability under § 8(a) of the NLRA. See Bankr. Dkt. 39 at 4–5 (citing *National Labor Relations Board v. Gordon (In re Gordon)*, 303 B.R. 645, 657 (Bankr. D. Colo. 2003)). But if the NLRB's position were truly that its prior determination of liability under the NLRA should be given preclusive effect with regard to the Bankruptcy Court's determination of dischargeability under the Bankruptcy Code, then its claim for collateral estoppel would necessarily call for an analysis of whether: (1) the issue sought to be precluded is the same as that involved in the prior proceeding, (2) the issue was actually litigated in that proceeding, (3) the determination of that issue was essential to the final judgment of the proceeding, and (4) the party against whom the preclusion is invoked was fully represented in the prior proceeding. *Matrix IV, Inc. v. Am. Nat'l Bank & Trust Co.*, 649 F.3d 539, 547 (7th Cir. 2011) (citing *H–D Mich., Inc. v. Top Quality Serv., Inc.*, 496 F.3d 755, 760 (7th Cir. 2007)). Moreover, to determine whether the issues "involved" and "actually litigated" in the prior labor proceedings are the "same" as those at issue in the adversary bankruptcy proceedings, we would need to take a closer look at the underlying unfair labor practice decisions promulgated by the ALJ, NLRB, and Seventh Circuit to determine whether the NLRA analysis conducted in those proceedings "substantially mirrored the federal test for maliciousness " such that it should be given preclusive effect here. *Horsfall*, 738 F.3d at 775.

Yet the NLRB conducts none of the aforementioned analysis. Indeed, rather than discussing the analysis conducted in the underlying unfair labor practice proceedings,

with specific regard to the *mens rea* elements needed to prove a violation of § 8(a) of the NLRA, the NLRB simply makes vague reference to certain "findings" from those proceedings which it views as persuasive in its argument that the debt should be excepted from discharge. See Dkt. 10 at 13. Specifically, the NLRB references (without citation) the Board's findings that Calvert, on behalf of his company, acted out of antiunion animus in intentionally discharging Company employees to avoid future collective bargaining, which was unlawfully discriminatory under the NLRA. *Id.* The NLRB then abruptly concludes:

> The NLRB has found that Calvert terminated his employees unlawfully—to deprive them of their right under the Act—and, *a fortiori*, without just cause. Therefore, the maliciousness of the injury, as reckoned by the Seventh Circuit, is the same issue litigated in the underlying unfair labor practice proceeding.

Id. at 13–14. Again, in order to conclude that a determination of liability under the NLRA is the "same" as a finding of malice under § 523(a)(6) of the Bankruptcy Code for purposes of collateral estoppel, the Court would need to compare the methods of analysis germane to each statute and determine whether the they "substantially mirror" one another. It is the NLRB's burden to make such a showing, *see e.g.*, *Cobin v. Rice*, 823 F. Supp. 1419, 1431 (N.D. Ind. 1993), but the NLRB has failed to do so; indeed, the NLRB has failed to even attempt to meet its burden by engaging in the necessary analysis. "It is the parties' duty to package, present, and support their arguments," *Roger Whitmore's Auto Srv. v. Lake Cnty.*, 424 F.3d 659, 664 n.2 (7th Cir. 2005), and for good reason; for us to embark on an expedition through the records of the underlying labor and bankruptcy

proceedings in order to engage in a collateral estoppel analysis without it having been briefed before us would defeat the adversarial aims of our jurisdiction. Moreover, it would risk striking a severe unfairness to Calvert, the party against whom the NLRB seeks to offensively employ estoppel. As the D.C. Circuit Court of Appeals recognized, "The doctrine is detailed, difficult, and potentially dangerous." *Jack Faucett Assocs. v. AT&T*, 744 F.2d 118, 124 (D.C. Cir. 1984). The effect of its acceptance is, in essence, to close the courthouse doors to a party with regard to a particular claim or issue, which is why the doctrine's use is limited to only those situations where that party has already received a "full and fair" opportunity to litigate its claims, *see Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979). An issue carrying such grave consequences requires full analysis by the parties and the court. Because the NLRB has provided us no analysis of the elements of collateral estoppel, nor has it provided with specific citation the materials needed to conduct such an analysis, we are ill-equipped to rule on this issue. Accordingly, we leave undisturbed the Bankruptcy Court's ruling regarding the preclusive effect of the NLRB's determination of liability for violations of the NLRA. See Bankr. Dkt. 39.

Alternatively, the NLRB appears to take the position that, in reaching its conclusion that Calvert did not act with the malice required to except the debt from discharge pursuant to § 523(a)(6), the Bankruptcy Court must have failed to give appropriate weight to the factual findings made in the prior proceedings. See Dkt. 10 at 13 ("the Bankruptcy Court erred here by analyzing the maliciousness of Calvert's

conduct without deference to the administrative record in the prior unfair labor practice proceeding."). It is somewhat unclear what deference the NLRB believes the administrative record is due. In its order on summary judgment, the Bankruptcy Court held that a ruling of liability under the NLRA does not compel a ruling of dischargeability under § 523(a)(6), but it went on to state that "'[i]f the ALJ made specific findings of fact with respect to the [debtor's] intent as to the employees,'" those findings would be given preclusive effect and accepted as binding upon the Bankruptcy Court. See Bankr. Dkt. 39 at 5 (quoting *In re Gordon*, 303 B.R. at 657). However, the Bankruptcy Court's review of the underlying labor proceedings revealed that the only finding of fact made by the ALJ with regard to Calvert's intent was that Calvert acted out of "antiunion animus" in discharging the employees. *Id.* at 5–6. Because this finding of antiunion animus, alone, was insufficient to establish maliciousness under § 523(a)(6), the Bankruptcy Court denied the NLRB's motion for summary judgment and stated that it would "analyze whether the facts proven at trial, particularly with respect to the intent of Calvert to harm the subject employees, will support a conclusion of nondischargeability." *Id.* at 6.

We have no indication that the Bankruptcy Court discarded the NLRB's finding of antiunion animus in weighing the evidence here. Rather, it appears that the only new evidence adduced at trial was that, following the Union's loss in the September 2002 election, Calvert's company switched to temporary employees in order to avoid the costs associated with any further audits being conducted by the Indiana Department of Labor,

but that, at the time he made the cost-saving decision, he was unaware that the ALJ would, a year later, order a new election or that the ALJ's decision would be affirmed two years later by the NLRB. See Dkt. 11-4 at ¶ 14. Weighing the NLRB's finding of antiunion animus (which the Bankruptcy Court had already stated could not by itself establish malice) against this newly-developed evidence regarding Calvert's motives and knowledge, the Bankruptcy Court held:

> The NLRB did not present evidence from which the Court can conclude that, at the time the decision was made, it was more likely than not that Calvert consciously disregarded the organization rights of the Company's employees when Calvert presented uncontroverted evidence of a legitimate business reason for the layoffs/promotions.

Id.

"The question whether an actor behaved willfully and maliciously is one of fact." *Horsfall*, 738 F.3d at 776. As such, we must accept the Bankruptcy Court's finding that Calvert did not act maliciously within the meaning of the dischargeability exception so long as that finding is not "clearly erroneous." *See Matter of Thirtyacre*, 36 F.3d 697, 700 (7th Cir. 1994); *see also* 11 U.S.C. § 523(a)(6); Fed. R. Bankr. P. 8013. "Under this standard, if the trial court's account of the evidence is plausible in light of the record viewed in its entirety, a reviewing court may not reverse even if convinced that it would have weighed the evidence differently as trier of fact." *Matter of Love*, 957 F.2d 1350, 1354 (7th Cir. 1992). Indeed, reversal under the clearly erroneous standard is only warranted if "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Id.*, *citing*, *EEOC v. Sears, Roebuck &*

Co., 839 F.2d 302, 309 (7th Cir. 1988). We are left with no such conviction here. It appears that the Bankruptcy Court was persuaded by the testimony elicited from Calvert during his trial that, at the time he made the decision to eliminate his full-time workforce in favor of less-expensive temporary workers, he did not know whether there would be a union going forward, nor was he aware that the NLRB would throw out the September 2002 elections results, find that his company engaged in unlawful conduct under the NLRA, and order a new elections to be held, but instead he believed that the switch was a legitimate cost-saving measure. See Bankr. Dkt. 56. As the Seventh Circuit instructs, "We must be especially deferential toward a trial court's assessment of witness credibility." *Horsfall*, 738 F.3d at 776. With that deference in mind, we do not find the Bankruptcy Court's conclusion to be clearly erroneous. Accordingly, we accept the Bankruptcy Court's finding that the NLRB failed to establish by a preponderance of evidence that Calvert acted with the requisite malice to except his debt owed to the Company's former employees from dischargeability pursuant to 11 U.S.C. § 523(a)(6).

Conclusion

For the reasons detailed above, the Bankruptcy Court's ruling is AFFIRMED in all respects. Final judgment shall issue accordingly.

IT IS SO ORDERED.

Date: 3/31/2017

SARAH EVANS BARKER, JUDGE
United States District Court
Southern District of Indiana

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

NATIONAL LABOR RELATIONS BOARD,	)	
Appellant,	)	
vs.	)	No. 1:16-cv-00161-SEB-MJD
EDWARD LEE CALVERT,	)	
Appellee.	)	

JUDGMENT

Pursuant to the Court's ruling simultaneously entered on this date, the decision of the Bankruptcy Court is AFFIRMED.

IT IS SO ORDERED.

Date: 3/31/2017

SARAH EVANS BARKER, JUDGE
United States District Court
Southern District of Indiana

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

NATIONAL LABOR RELATIONS BOARD,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**No. 1:16-CV-00161-SEB-MJD**
	)	
EDWARD LEE CALVERT,	)	
	)	
Defendant.	)	

NOTICE OF APPEAL TO THE SEVENTH CIRCUIT

Notice is hereby given that Plaintiff National Labor Relations Board appeals to the United States Court of Appeals for the Seventh Circuit, the Final Judgment entered in this matter on March 31, 2017 by the United States District Court for the Southern District of Indiana [Dkt. 14; Dkt. 15].

Respectfully submitted,

NATIONAL LABOR RELATIONS BOARD

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Dated at Washington, DC
this 28th day of April, 2017

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 28, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which sent notification of such filing to the following:

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29 U.S. Code § 157 - Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

29 U.S. Code § 158 - Unfair labor practices

(a) Unfair labor practices by employer. It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.